

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

PROCEEDINGS IN COMMITTEE OF THE WHOLE

UNIFORM CONTROLLED SUBSTANCES ACT

July 13 - 20, 1990

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I N D E X

UNIFORM CONTROLLED SUBSTANCES ACT

Saturday, July 14, 1990

Third Session.1

Fourth Session 92

Monday, July 16, 1990

Sixth Session.248

Tuesday, July 17, 1990

Eighth Session366

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THIRD SESSION

UNIFORM CONTROLLED SUBSTANCES ACT

SATURDAY, JULY 14, 1990

Harry D. Leinenweber of Illinois, presiding.

CHAIRMAN LEINENWEBER: Will the commissioners come to order. We are going to commence the consideration of the Uniform Controlled Substances Act. The first order of business, I am going to call on the chairman of the committee, Chairman Gibson, to provide an overview of our work.

Chairman Gibson.

COMMISSIONER DAVID A. GIBSON (Vermont): My name is Gibson from Vermont, chairman of the Committee on Revision of the Uniform Controlled Substances Act. The Chairman of the Whole is Commissioner Leinenweber from Illinois.

At this time, I would like to introduce the members of the committee who are at the podium.

Starting on my far left is Commissioner Yates from New York. Seated next to him is David Joranson, who is an adviser for the committee and has been granted privileges for participation in the floor discussion. Next to him is Commissioner Reid Pixler from Colorado. Seated next to Mr. Pixler is Alberto Ferrer, commissioner from Puerto Rico.

1 Going to the far right is Commissioner Curtis
2 Reitz, who is division chairman. Seated to his left is
3 Commissioner Jack Deacon from Arkansas. Next to
4 Commissioner Deacon is Patrick Guillot, commissioner
5 from Texas. To Commissioner Guillot's left is Richard
6 Braun, commissioner from North Carolina. And next to
7 Commissioner Braun is Jay Buringrud, commissioner from
8 North Dakota.

9 Unfortunately, Commissioner Everett from North
10 Carolina had a conflict with the date that the
11 conference was meeting and is away and unable to be
12 present at this time.

13 Mr. Chairman, before I get into my remarks, I
14 would ask, pursuant to the rules of the conference,
15 43.1, that unanimous consent be given for Harry Harbin,
16 who is an Assistant Attorney General with the
17 Department of Justice, to be permitted to sit on the
18 podium as adviser.

19 CHAIRMAN LEINENWEBER: You heard the motion.
20 Any discussion?

21 Hearing none, all those in favor, signify by
22 saying "aye."

23 All those opposed.

24 The "ayes" have it. The gentleman has the
25 privileges requested.

1 COMMISSIONER GIBSON: Thank you very much. I
2 note in materials that were sent from the headquarters
3 of the conference last December in its report to the
4 ABA that the Uniform Controlled Substances Act is up
5 for its fourth and final reading. We will see whether
6 that prediction is carried out.

7 It is also somewhat fitting that we are
8 starting consideration of the fact again on Bastille
9 Day. I tried to arrange for a guillotine to be placed
10 outside the doors, but have not quite succeeded in
11 that, so there won't be any recriminations of that
12 sort.

13 I'd like to recap briefly what has happened
14 since we met in Hawaii. Amendments that were
15 considered at that time have been incorporated into the
16 provisions. As you recall, we were able to get into
17 what was Section 505, relating to forfeiture, at that
18 time, to subsection (d), but did not complete the
19 reading for final approval at that time.

20 We will pick up from that point this year.
21 However, Section 505, relating to forfeiture, has now
22 been segregated into a totally new Article 5,
23 comprising Article Sections 501 through 521.

24 What is now in Article 6 as Section 601, et
25 cetera, includes parts of what used to be Article 5,

1 Sections 601 through 604 -- were considered last year
2 and will not be read again this year.

3 What are now Sections 501 through 503 was
4 505(a) through (d) last year. We will not read those
5 again at this time. There are some changes to them
6 which I will highlight.

7 Before I do move on to highlight the
8 provisions in the act, I would, however, like to read
9 one communication that has been received by the
10 conference. The letter carries the letterhead, the
11 White House, Washington, July 12, 1990.

12 "I am pleased to send my greetings to all
13 those gathered for the National Conference of
14 Commissioners on Uniform State Laws as you complete
15 your review of comprehensive revisions to the Uniform
16 Controlled Substances Act.

17 "Twenty years ago, when the act was adopted,
18 it provided the basis for virtually every state's drug
19 laws, as well the Federal Controlled Substances Act.
20 Over the years, however, the growing sophistication of
21 drug offenders has rendered statutory tools adopted two
22 decades ago obsolete, and I salute the commissioners'
23 decision to draft these much needed revisions.

24 "While the Congress has revised the Federal
25 Controlled Substances Act to meet new threats, such

1 federal responses are, at best, a partial solution.
2 America's fight against the epidemic of illegal drug
3 use cannot be won on any single front alone. As I told
4 the Ccngress when announcing our national drug control
5 strategy, our battle must be waged everywhere -- at
6 every level of federal, state, and local government,
7 and by every citizen in every community across the
8 country.

9 "Illicit drug enterprises look to expand in
10 places where legal conditions are favorable. As some
11 states have cracked down through more stringent
12 statutes and tougher enforcement, drug traffickers have
13 relocated to other states not yet prepared with laws as
14 sophisticated as the criminals. With nine out of ten
15 drug cases in the country being prosecuted by local and
16 state authorities, the only truly effective response to
17 the mobility and ingenuity of drug traffickers is for
18 each state to forge a strong link in a national chain
19 of defense. Thus, effective, fair, uniform legislation
20 is crucial.

21 "The proposed amendments prepared by your
22 drafting committee embody many of the principles
23 included in the national control strategy. I urge the
24 conference to adopt these amendments.

25 "The National Conference of Commissioners on

1 Uniform State Laws has a unique opportunity, and indeed
2 a responsibility, not only to promote the fair and
3 effective legislation that Americans want, but also to
4 forge the consistency in state law that will offer no
5 shelter for the producers, sellers or users of illegal
6 drugs.

7 "On behalf of all Americans, I ask for your
8 help and support."

9 Signed, George Bush.

10 With that background, I will highlight some
11 changes that were made from last year. On Page 13 of
12 the act, in a comment, which I would not usually
13 highlight, but I think is significant, we added some
14 language at Lines 24 through 30 which indicates how we
15 have not included a definition of addict or
16 drug-dependent person or habitual user, but that if
17 states do choose to do so, that this definition should
18 not include persons who are patients using a controlled
19 substance pursuant to the lawful order of a
20 practitioner.

21 The purpose of that comment is, obviously, to
22 make sure that physicians and people in the health care
23 field do not feel intimidated by what is contained in
24 this act in connection with treatment of persons who
25 may need to use controlled substances for that

1 treatment.

2 We have added also in Section 308(f) on Page
3 65, at Lines 24 and 25, language relating to treatment
4 including -- that it includes the dispensing or
5 administering of a narcotic drug for pain, including
6 intractable pain. Again, based on feedback from the
7 medical community, we felt it was important to make
8 sure that physicians would not feel cowed and that
9 pharmacies would not feel reluctant to make sure that
10 persons who are suffering from pain, such as cancer,
11 afflicted persons received the appropriate medication
12 to deal with that pain.

13 On Page 66, in Line 7, a typographical error.
14 The word "not" was inadvertently omitted after the word
15 "may" in Line 7, so that that provision will be amended
16 to read: "An individual practitioner may not
17 dispense," et cetera.

18 Turning now to Article 5 at Page 104, the
19 provisions of the definitions were reviewed at the
20 meeting in Hawaii. Based on the discussions, we have
21 added a definition for attorney for the state. We have
22 altered the definition of interest holder to comport
23 more with the suggestions received from the persons
24 more familiar with the commercial law requirements. We
25 have made some changes which we believe are of a more

1 substantive nature, just to be shorter and more
2 concise, in the definitions of owner, proceeds and
3 property.

4 We have added a definition for seizing agency.
5 And we have changed, again without substance, the
6 definition of seizure for forfeiture, just to make it
7 read more clearly.

8 Section 502, which is bracketed provisions,
9 both subsections (a) and (b), again have had minor
10 changes based on what was discussed at Hawaii and in
11 the work of the committee this year. Again, we do not
12 believe these changes are of a major or substantive
13 nature.

14 Section 503 relates to a provision relating to
15 what conduct gives rise to forfeiture. There has been
16 a change in subsection (2). There may be some
17 confusion in that the extent to which that section
18 extends -- I expect the committee will look at it
19 before any final approval is given to make sure that
20 what we have done is not a substantive change from what
21 was presented last year.

22 With that, I will cease my comments, except to
23 indicate that we will proceed to a reading of Sections
24 504 to 521, Sections 605 to 607, and Sections 701
25 through 705. After we complete that, we will take any

1 further amendments that the conference members may wish
2 to move regarding the entire act, Articles 1 through 7,
3 so that final approval of this act may be presented for
4 a vote by the states on Thursday.

5 Thank you.

6 CHAIRMAN LEINENWEBER: Commissioner Langrock
7 for some sort of point of order or motion.

8 COMMISSIONER PETER F. LANGROCK (Vermont): Is
9 my understanding correct that the committee is treating
10 the reading of the forfeiture provisions as a final
11 reading? Is that correct?

12 COMMISSIONER GIBSON: Correct.

13 COMMISSIONER LANGROCK: I think that is in
14 violation of the conference rules, and I would like to
15 move that this be treated as a first reading.

16 I would like to speak to that issue, if I
17 might.

18 CHAIRMAN LEINENWEBER: Proceed.

19 COMMISSIONER LANGROCK: I would like to make a
20 disclaimer first, and that is, I heard the letter from
21 the White House, and it reminded me of President
22 Johnson's request for more troops for Vietnam. If we
23 only had more troops, we could win the war. If we only
24 had more troops, the White House says, we can win the
25 war on drugs.

1 I happen to think that approach is wrong. I
2 think it is ineffective. I think time will prove that
3 position, my position, correct. But I am not trying to
4 put that position forward here today. I think what we
5 have to do here today is to produce the very, very best
6 act we can. This is an act not like many of the acts
7 we have here which lay on the shelf. This is going out
8 to the states. This is going to affect human beings.
9 It is going to break up families, put people in jail,
10 is going to put pressures on treasuries. It is going
11 to do all sorts of things. And of any act that we have
12 ever had before the conference, this will probably have
13 a greater effect on the people out in the streets.

14 I think, for that reason, we have to give this
15 the full consideration that the conference can give it.
16 The forfeiture provisions are something which I think
17 we are uniquely capable of doing. These are
18 lawyer-like issues. They require real thinking. I
19 have received, and I expect everybody else has,
20 probably three, four inches of suggestions, thoughts on
21 this matter.

22 Now, if I recall correctly, the provisions
23 from 503 or 504 on have never been read by the
24 conference. Now, I understand that there were some
25 matters read in 1988. I would like to read to you -- I

1 don't think that the substance that we have here today
2 has ever been before this conference before. This is a
3 matter talking about the -- I don't know the name --
4 the American Prosecutors Research Institute. This is
5 their publication. I would like to read this to you:

6 "A major project of the APRI's national drug
7 prosecution center has been its work with the National
8 Conference of Commissioner on Uniform State Laws on
9 amendments to the Uniform Controlled Substances Act of
10 1970. The USCA has served as the basis for the
11 existing drug laws in almost every state for the past
12 20 years. The National Conference was prepared to
13 adopt revisions of the act in the summer of 1988 that
14 would have been disastrous to enforcement and
15 prosecution. However, NDAA formed a powerful coalition
16 with the National Association of Attorneys General, the
17 Department of Justice, and a number of governors. This
18 coalition, led by APRI's national drug prosecution
19 center, and using the technical expertise of the
20 front-line prosecutors in the drug control working
21 group, successfully blocked adoption of these harmful
22 provisions."

23 If that is the type of lobbying -- which I
24 don't like. I have been in the conference my 24th
25 consecutive meeting. I am not a potted plant. And I

1 don't plan to stand here and let this conference, if I
2 can help it, produce something of an inferior quality.

3 I would like to go to the rules. If anybody
4 here in their conscience can say, "This floor has
5 considered these amendments, has considered these
6 forfeiture provisions," then I don't know when it was.
7 The rules of this conference, which made this
8 conference and our work product great, are in 8-1.

9 I would like to read that to you: "The
10 Conference may not finally approve an Act and recommend
11 its adoption by the several states until the Act has
12 been:

13 "(1) considered section by section by the
14 Conference of the Committee of the Whole."

15 Then there is "printed or typewritten," et
16 cetera.

17 "(3) presented to the subsequent annual
18 meeting for any further consideration the Conference
19 may desire to give it."

20 I have not been afraid to fight battles in
21 this conference. I have lost battles. I think I have
22 taken them, when I lost them, with a certain amount of
23 grace. I don't mind losing battles. I don't like
24 being procedured -- or not even procedured, but
25 interpreted away. The substance of this matter is, we

1 have not considered this. We should consider it. We
2 can do it. There is no need for a rush to judgment on
3 these forfeiture provisions. Let's get a good working
4 act.

5 If we want to, if we want to waive this
6 requirement, the constitution provides another
7 provision, and that is 8.3 or 7.3, which says: A vote
8 by states can override and waive this requirement. But
9 I suggest to you that a fair interpretation of these
10 forfeiture provisions is that this is a first reading.
11 And we all have political pressures at home. We know
12 there is a big hurry. We know there is pressure,
13 prosecutors around here, saying: We've got to get it.
14 We even got a letter from the White House. But I don't
15 think that is a reason for us to violate the procedures
16 and turn out an inferior work product.

17 I urge you to follow the tradition of this
18 conference and be free from the pressures outside, to
19 respond as commissioners, with the trust, the
20 responsibility that we have to our own states to do a
21 proper work product and to follow the procedures of the
22 conference.

23 I therefore urge acceptance of that motion.

24 CHAIRMAN LEINENWEBER: Commissioner, just to
25 clarify. Are you making a motion or bringing a point

1 of order or what?

2 COMMISSIONER LANGROCK: I think the record
3 will show that I moved that this be treated, the
4 forfeiture provisions be treated as a first reading.
5 We can talk about whether they're separate later on or
6 something else, but the motion, I think, is quite
7 clear.

8 CHAIRMAN LEINENWEBER: Is Commissioner Pomeroy
9 on the floor? Is that motion in order, sir, as a
10 motion? It may be in order as a point of order.

11 COMMISSIONER ELWAINE F. POMEROY (Kansas):
12 Well, it certainly is as a point of order. I feel that
13 it would be proper as a motion in order to get to the
14 essence of it.

15 CHAIRMAN LEINENWEBER: So the motion is in
16 order. The motion is that the reading of Article 5,
17 commencing with -- Article 5 be considered a first
18 reading. Is that correct?

19 COMMISSIONER LANGROCK: Correct.

20 PRESIDENT BUGGE: Mr. Chairman, I rise to
21 respectfully disagree with the commissioner from
22 Vermont. The Executive Committee, in approving the
23 agenda for this meeting, designated the Uniform
24 Controlled Substances Act for final reading. It in
25 fact is the fourth time this particular act has been

1 considered by the conference and the Committee of the
2 Whole.

3 The argument that a particular section or a
4 particular article of the act was not presented and
5 fully read before the conference in prior readings can
6 be made and said about every act that has been
7 presented to this conference for two or more readings.
8 Because between the first reading and the second
9 reading, there are always changes, and the subject of
10 regulation of controlled substances has certainly been
11 before this conference on at least three prior
12 occasions.

13 That is not to say that the act or Article 5
14 of the act deserves final promulgation. That is for
15 the Committee of the Whole and the conference to decide
16 after the present draft is considered.

17 I would request that Commissioner Langrock
18 withdraw his motion until the reading of Part 5, or
19 Article 5, dealing with forfeitures has been completed
20 in a Committee of the Whole, at which point I think the
21 matter should be decided on the merits of the substance
22 of Article 5 and its provisions rather than on whether
23 technically or not, or traditionally or not, we have
24 complied with Rule 8.3 of the conference.

25 I think the conference needs to be -- and I

1 share the concern of Mr. Langrock, concern about the
2 quality of the prduct. And the issue he raises goes
3 to that rather than to the conference procedures,
4 although, as I say, I think virtually every act that
5 has been approved by this conference could be subject
6 to the same argument, that particular provisions of it
7 had nct been fully read at prior meetings.

8 Therefore, with respect, I would urge
9 Commissioner Langrock to withdraw his motion to a later
10 time.

11 COMMISSIONER PETER F. LANGROCK (Vermont):
12 Commissioner Bugge is a great lawyer, and he is trying
13 to shift the burden of proof. I say that he can get
14 the result by taking a vote at the end. What the
15 difference is, that as we proceed here, do we proceed
16 on the basis of suggestions and drafting and helping,
17 or do we go into a very formalistic situation, which we
18 would in a final reading, and have everything by motion
19 and try to draft from the floor?

20 It's for that procedural reason that I think
21 that we are both in agreement that we can take another
22 look at this at the other end of the spectrum -- but
23 who's got the burden on it -- and I think a fair
24 reading of the rules is that it should be a first
25 reading.

1 I might point out to the Executive Committee,
2 I wrote back in April of this year to Mr. --

3 COMMISSIONER CHARLES W. JOINER (Michigan):
4 Point of order. It is not the business of a Committee
5 of the Whole to take this matter up. It's the business
6 of the conference to take this matter up. Until we
7 move out of the Committee of the Whole to the
8 conference, we should have no business whatsoever
9 taking this matter up. It's conference business, not
10 the business of the Committee of the Whole.

11 This Committee of the Whole was formed to read
12 section by section, and it's not the business to decide
13 whether this is a first or second reading.

14 CHAIRMAN LEINENWEBER: The parliamentarian has
15 ruled that the motion is in order, commissioner. So,
16 you may continue.

17 PRESIDENT BUGGE: Point of order, Mr.
18 Chairman. I would like to appeal the decision of the
19 Chair on the parliamentary issue of whether this is a
20 matter properly before the Committee of the Whole.

21 CHAIRMAN LEINENWEBER: All right. The ruling
22 of the Chair has been appealed. Is there discussion?

23 Hearing none, all those in favor of the Chair,
24 say "aye."

25 All those opposed, "no."

1 The "noes" appear to have it.

2 Division. There has been a request for
3 division of the House. All those in favor of the
4 Chair's ruling, which is to consider the motion, please
5 rise.

6 All those opposed to the Chair, please rise.

7 The appeal to the Chair has prevailed. The
8 Chair is overruled. The motion is therefore held to be
9 out of order. The voting was 68 against the Chair and
10 48 in favor, so we will now proceed in a line-to-line
11 reading commencing at Section 504.

12 COMMISSIONER EUGENE A. BURDICK (North Dakota):
13 Mr. Chairman, I would like to suggest a middle ground
14 on this, and that is that for the purpose of discussion
15 in the Committee of the Whole, that the conference be
16 given the opportunity to suggest further drafting at
17 this session rather than the formality of making
18 motions of specific language, with respect to Article 5
19 only. In other words, that we be given a little bit
20 more leeway here, because those sections have not been
21 read and have not been considered section by section.
22 This does not mean to treat the act, that part of the
23 act as a first reading, but to give a little more
24 flexibility to consideration of the provisions that
25 have not been read or considered.

1 CHAIRMAN LEINENWEBER: The Chair intends to
2 give the commissioners, whoever wish to comment on the
3 sections, their right to say whatever they wish to say.
4 So, we will proceed in the normal method, reading line
5 by line, and open the sections up to discussion..

6 Commissioner Langrock.

7 COMMISSIONER PETER F. LANGROCK (Vermont): I
8 would like at this time to move that the committee rise
9 and turn itself back to the conference for purposes of
10 consideration the previous motion.

11 I think Commissioner Joiner's position has
12 some merit, and I think that we should determine early
13 on so that the Committee of the Whole can proceed in an
14 appropriate fashion as to whether this is a first or
15 second reading.

16 CHAIRMAN LEINENWEBER: The motion --
17 Commissioner Pomeroy.

18 [Laughter]

19 COMMISSIONER ELWAINE F. POMEROY (Kansas): You
20 understand that in giving a ruling it doesn't mean I
21 support the motion, but it's a motion that is in order.

22 CHAIRMAN LEINENWEBER: The motion is in order,
23 is that correct, sir? The motion therefore is that the
24 Committee of the Whole rise -- what exactly -- restate
25 your motion.

1 COMMISSIONER LANGROCK: That the Committee of
2 the Whole rise and we return to the -- that the working
3 of the conference itself.

4 CHAIRMAN LEINENWEBER: You have heard the
5 motion. Ready for a vote?

6 All those in favor, signify by saying "aye."

7 All those opposed, "no."

8 The "noes" appear to have it.

9 A COMMISSIONER: Division.

10 CHAIRMAN LEINENWEBER: Division. All those in
11 favor, please rise. Please be seated.

12 All those opposed, please rise.

13 The Chair counts 68 votes in favor and 72
14 against, so the motion fails.

15 We will now proceed with a line-by-line
16 reading commencing at Section 504, Page 106.
17 Commissioner Buringrud.

18 COMMISSIONER JAY E. BURINGRUD (North Dakota):
19 Thank you.

20 "SECTION 504. PROPERTY SUBJECT TO SEIZURE AND
21 FORFEITURE. The following property is subject to
22 seizure and forfeiture:

23 "(1) all controlled substances, raw materials,
24 controlled substance analogs, counterfeit substances,
25 or imitation controlled substances that have been

1 manufactured, distributed, dispensed, possessed, or
2 acquired in violation of this [Act];

3 "(2) the whole of all property, including
4 every divided or undivided interest, that is:

5 "(i) furnished or intended to be furnished by
6 any person in exchange for a controlled substance in
7 violation of this [Act]; or

8 "(ii) used or intended to be used in any
9 manner or part to facilitate conduct giving rise to
10 forfeiture, but a conveyance subject to forfeiture
11 solely in connection with conduct in violation of
12 Section 406 may be forfeited only pursuant to Section
13 514;

14 "(3) all proceeds of any conduct giving rise
15 to forfeiture;

16 "(4) all weapons possessed, used or available
17 for use in any manner to facilitate conduct giving rise
18 to forfeiture; and

19 "(5) any property affording a source of
20 influence over any enterprise a person has established,
21 operated, controlled, or conducted by means of conduct
22 giving rise to forfeiture."

23 CHAIRMAN LEINENWEBER: Commissioner.

24 COMMISSIONER ALLAN G. RODGERS (Massachusetts):
25 I am concerned whether the language here will authorize

1 the forfeiture of tenancies.

2 Two years ago, I think it was, there was some
3 similar language which was in another part of the act,
4 and I asked the question, I think of the committee, at
5 that time, whether the committee intended the
6 forfeiture procedures to authorize an agency to come in
7 and in effect summarily evict a tenant because of
8 alleged drug activity going on in that particular
9 residence.

10 I remember the answer was "no." And last
11 year, I don't think the language on this point was
12 changed enough, but in the intervening time, the
13 Justice Department at the federal level has taken the
14 position that the comparable language in the federal
15 act does authorize agencies to come in and effect
16 seized apartments or residences and summarily evict
17 their residents. There are a number of instances in
18 the last year where this has happened.

19 It seems to be that that is a serious mistake,
20 not only because you're talking about people's
21 residences, but because I don't believe it is necessary
22 to have summary eviction in order to fulfill the
23 purposes of either forfeiture or enforcement of the
24 drug act.

25 If there is activity that is going on in a

1 particular residence which is authorized as eviction,
2 there are eviction proceedings on the civil side that
3 will enable the owner or even the forfeiting agency to
4 come in and go through those processes. But to allow
5 an agency, through the forfeiture means, to come in and
6 summarily be able to evict somebody in the guise of
7 forfeiture, I think is a serious mistake.

8 I will not go in at this time to tell the
9 kinds of horror stories that I have heard about in the
10 last few months, but there is now a policy at the
11 federal level that is authorized under the forfeiture
12 statute that -- seizure of public housing units in
13 various parts of the country, in 20 jurisdictions at
14 present. And there have been a number of cases where
15 there have been summary evictions taking place in
16 circumstances where I think the facts simply showed
17 that it was not justified.

18 I would like to ask the committee what their
19 intentions are, whether they have discussed this issue,
20 whether they think the language is broad enough to
21 authorize the summary forfeiture of tenancies.

22 If the answer is that they think it is, I have
23 an amendment to offer that would exclude the use of the
24 forfeitures for summary evictions.

25 CHAIRMAN LEINENWEBER: Commissioner Gibson.

1 COMMISSIONER DAVID A. GIBSON (Vermont):

2 Commissioner, in Section 506 on Pages 111 and 12,
3 beginning in subsection (b), we treat real property as
4 being treated a little differently than the summary
5 seizure of forfeitable assets.

6 It specifically provides that under -- that
7 property that is subject to forfeiture under Section
8 504, except for real property, may be seized without
9 process. We go on to provide that in Lines 8 and 9 on
10 Page 112, that real property may not be seized without
11 an adversarial judicial proceeding.

12 Thus, I think your tenant has an interest in
13 real property in terms of its leasehold and that he
14 cannot be summarily evicted from his apartment, or
15 whatever the interest is, without an adversarial
16 judicial hearing first being held. Hopefully, that
17 will alleviate some of your concern.

18 COMMISSIONER RODGERS: That is not
19 satisfactory, I think for two reasons. One is that the
20 burden of proof that you have in here for forfeiture
21 proceedings, at least in certain circumstances, puts
22 the burden of proof on the other side to show that the
23 asset should not be forfeited. So that even though you
24 may provide an adversarial hearing, the burden of proof
25 in the circumstances of the hearing is quite different

1 than an ordinary eviction case.

2 Secondly, you authorize, obviously, a quick
3 hearing without advance notice, without showing grounds
4 under the usual procedures for eviction. So, for
5 example, under this provision, even though you provide
6 an adversary hearing -- and, obviously, that will help
7 some -- that hearing can be held almost instantly,
8 whereas eviction proceedings traditionally take a
9 longer period of time, require more documentation, more
10 proof, a showing of violation of the lease, and the
11 like.

12 So, what you have here is an opportunity for
13 somebody to go into court right away, get an immediate
14 hearing, even though it may be an adversarial hearing
15 and somebody is entitled to be represented -- because
16 of the burden of proof and because of the speed, I
17 don't think it's a satisfactory substitute for the
18 ordinary eviction proceedings when you are talking
19 about kicking somebody out of their home.

20 COMMISSIONER JAMES A. YATES (New York):
21 Question was directed to the committee. I think that
22 Mr. Gibson's answer dealt with seizures pending final
23 determination. I think you're concerned with what is
24 going to happen at the end after there is a judgment of
25 forfeiture.

1 There is really nothing in here that I am
2 aware of that would protect the interests that you're
3 concerned about after the forfeiture action has been
4 decided. I think that is probably a hole or an
5 omission and is something we need to deal with.

6 COMMISSIONER NEAL OSSEN (Connecticut): Going
7 back to this real property, it's my understanding that
8 those people who are owners of cooperative units are
9 not deemed to be owners of real property, but it's a
10 personal property right. So I shouldn't want
11 high-income people who have cooperative apartments --
12 and there are a lot of low-income people who are in
13 cooperatives.

14 So, I think you've got to change your thing to
15 include within the definition of real property, after
16 the commissicner takes care of it, those owners of
17 cooperative units.

18 But my real reason for being here is, if my
19 house is burglarized and my VCR and whatever items are
20 taken by a person who then uses my property which is
21 stolen to purchase a controlled substance, do I take it
22 that that property is subject to forfeiture and I would
23 have no right or no knowledge, that all of a sudden the
24 property stolen from my house is now subject to
25 forfeiture?

1 CHAIRMAN LEINENWEBER: Commissioner Gibson.

2 COMMISSIONER DAVID A. GIBSON (Vermont): I
3 don't think that result would follow. No. 1, the
4 interest that the burglar had would not be a legal
5 title to that property, would still be your property.

6 No. 2, if he disposed of it in some drug deal,
7 your interest in that particular piece of property, I
8 think, could be clearly established under the
9 procedures outlined in this act so that you would get
10 your property back -- probably would be returned
11 administratively without having to go to court.

12 COMMISSIONER JAMES A. YATES (New York): On
13 that point. Commissioner Ossen, I think the point you
14 raise could be fixed if on Line 9 of Page 107, instead
15 of "any person," we were to say "the owner."

16 What you're concerned about is that someone
17 offers up property in exchange for drugs and that
18 property could have been stolen and it's forfeited and
19 then the owner loses it. I think it's a point well
20 taken, and I am not sure that the protections that we
21 have later on would really safeguard against your
22 concern.

23 COMMISSIONER NEAL OSSEN (Connecticut): Can I
24 move, or will you accept Commissioner Yates'
25 suggestion?

1 CHAIRMAN LEINENWEBER: What is the position of
2 the committee as to the suggestion? You wish a motion
3 or do you wish to accept that? All right. Did you
4 want to vote on it?

5 COMMISSIONER GIBSON: Yes.

6 CHAIRMAN LEINENWEBER: The committee does not
7 accept. Did you want to make a motion, sir?

8 COMMISSIONER OSSEN: I apologize. I move
9 Commissioner Yates' suggestion.

10 CHAIRMAN LEINENWEBER: Which is specifically
11 what?

12 COMMISSIONER YATES: Page 107, Line 9, "any
13 person" is deleted and "the owner," or "an owner" --

14 CHAIRMAN LEINENWEBER: You heard the motion.
15 On Line 9, Page 107, delete the words "any person" and
16 substitute therefor "the owner."

17 Is there discussion on the motion?

18 COMMISSIONER PETER F. LANGROCK (Vermont):
19 Question. Why is the committee objecting to that
20 change? Is there something here I don't understand or
21 don't see?

22 COMMISSIONER GIBSON: Definition of property
23 and of owner, as I understand the example, that
24 property would not be anything that was either owned or
25 in which the person who had custody of it actually had

1 any legal interest. We don't think it's necessary.

2 COMMISSIONER LANGROCK: Is it just you don't
3 think it is necessary or that there is something evil
4 in the change?

5 COMMISSIONER GIBSON: We think it's both
6 unnecessary and unevil.

7 [Laughter]

8 CHAIRMAN LEINENWEBER: Further discussion on
9 the motion? Commissioner.

10 COMMISSIONER WILLIS E. SULLIVAN (Idaho): I am
11 concerned about the term "owner." If it was being sold
12 to him under a title retention note, for example, the
13 owner might still be the retailer who sold him the
14 instrument. And certainly that would create a real
15 problem if you use the term "owner."

16 Is it elsewhere defined so that you're not
17 going to get into a mixup over that term?

18 CHAIRMAN LEINENWEBER: Question for
19 Commissioner Gibson.

20 COMMISSIONER GIBSON: "Owner" is defined to
21 mean a person other than an interest holder who has an
22 interest in property. A thief, obviously, is not an
23 owner under that definition.

24 CHAIRMAN LEINENWEBER: Further discussion on
25 the motion?

1 Seeing none, all those in favor of -- the
2 motion is to amend Line 9 on Page 107 by deleting the
3 words "any person" and substituting "the owner."

4 All those in favor, signify by saying "aye."

5 All those opposed.

6 The "noes" appear to have it. The motion
7 fails.

8 Further discussion on Section 504?
9 Commissioner.

10 COMMISSIONER ALLAN G. RODGERS (Massachusetts):
11 I would like to make a motion on the tenancy point, if
12 I could, and I have it in writing here.

13 CHAIRMAN LEINENWEBER: Yes, sir. Would you
14 pass it up. The motion from Commissioner Rodgers of
15 Massachusetts is to amend Section 504 in Line 25 -- is
16 that on Page 106?

17 COMMISSIONER RODGERS: 107.

18 CHAIRMAN LEINENWEBER: 107. In Line 25,
19 insert an "a" in parentheses before the sentence
20 starting in that line.

21 COMMISSIONER RODGERS: No, Mr. Chairman.
22 Insert an "a" at the beginning of the sentence after
23 Section 504, so that subsection (a) would be, starting
24 "the following property," et cetera, et cetera, going
25 down, and then to add a new subsection (b).

1 CHAIRMAN LEINENWEBER: I see. In other words,
2 you want to make 504, what is existing, a subparagraph
3 (a), and then add a following subparagraph (b), reading
4 as follows: "Nothing in this [Act] shall authorize the
5 eviction of any occupant from the occupant's principal
6 residence."

7 You heard the motion. Is there discussion?
8 Commissioner Langrock.

9 COMMISSIONER PETER F. LANGROCK (Vermont): If
10 I am not mistaken, there is some litigation going on
11 around the country right now where I believe there is
12 an injunction out by a federal judge against the
13 Justice Department in connection with using summary
14 eviction proceedings. And perhaps somebody -- Allan,
15 you may know more about that than I do.

16 COMMISSIONER ALLAN G. RODGERS (Massachusetts):
17 I know about that. I do not think that there is an
18 allegation that the language of the Federal Forfeiture
19 Act does not authorize the particular acts. I think
20 the litigation claims that it's a denial of due process
21 and a denial of federal housing regulations to evict
22 somebody using the forfeiture statute without due
23 process.

24 So, I don't believe the issue of whether or
25 not this kind of action is authorized under the federal

1 forfeiture law -- is raised in that lawsuit here.

2 COMMISSIONER LANGROCK: It's very hard to
3 draft from the floor, but I'd ask the committee, is
4 there any intention to use this section or allow it to
5 be used for an eviction proceeding?

6 CHAIRMAN LEINENWEBER: Commissioner. Who
7 wants to respond to his question?

8 COMMISSIONER DAVID A. GIBSON (Vermont):
9 Sorry, Peter, I was concerned with the Commissioner
10 Rodgers' motion, in that I think it's a little broad in
11 that even after a declaration by a court that the
12 property should be forfeited after final hearing and so
13 forth, you still couldn't evict based on the language
14 that this has.

15 So, I understand what you're getting at, but I
16 think it may be a little too broadly drawn.

17 Could you restate your inquiry.

18 COMMISSIONER LANGROCK: My question was, does
19 the committee wish this section at any time to be used
20 as a summary eviction proceeding?

21 I mean, I happen to disagree with you that a
22 tenancy is necessarily a real property interest. I
23 think under Vermont law it may well be treated as
24 personal property, at least for certain interests.

25 But I just wanted to know where you come down

1 on the substance. If you're trying to outlaw this from
2 being used for a summary eviction, let's say so some
3 way.

4 COMMISSIONER GIBSON: I don't know that the
5 committee has really looked at it from the point of
6 view of a summary eviction process.

7 We were concerned that -- on the effect on
8 real property, which is why we put in the language we
9 did relating to having an adversarial judicial hearing
10 prior to any real property being able to be seized by
11 law enforcement in connection with the conduct at the
12 real property.

13 Now, one of the problems also that arises is
14 the fact that real property can be rented and utilized
15 or owned and utilized for so-called crack houses or
16 other things that constitute a real source of problems
17 for law enforcement and for neighborhoods in general.

18 That is the other side of the coin, and the
19 maybe innocent tenant holder being summarily evicted.
20 We have tried to reach a middle ground on that so that
21 we do provide, before you can go in and blockade off a
22 piece of property, real estate, that you do have to
23 have the hearing and let the court in its wisdom make
24 whatever determination appears to be the appropriate
25 one relating to continued use of the real estate,

1 either subject to seizure or not being subject to
2 seizure.

3 COMMISSIONER LANGROCK: If I understand what
4 you are saying, the policy, substantive policy you had
5 is that you don't want tenants evicted without a prior
6 judicial hearing of some sort.

7 It just seems to me that -- why don't we say
8 that? I mean, right here -- I don't know if Allan's
9 motion is the perfect motion for it, but certainly
10 there is enough confusion here and enough confusion
11 over what is real property and what isn't real property
12 that I think we are talking about real people and real
13 homes, and this is not an imagined problem.

14 I mean, as Commissioner Rodgers just
15 indicated, there is litigation all over the country
16 dealing with a summary eviction proceeding under the
17 forfeiture statute -- maybe not on this legal point,
18 but this is something that we -- here is an area where
19 we can draft to avoid litigation. And if the committee
20 is willing to undertake that, I will wait to see how
21 they want to deal with. But to leave it the way it is,
22 I've got to support Commissioner Rodgers' motion.

23 CHAIRMAN LEINENWEBER: Yes? What is the
24 position of the committee, that they will . . .

25 COMMISSIONER GIBSON: I think we have a

1 consensus that the committee would relook at the
2 language that I alluded to earlier to make sure that
3 the problems presented are not ones that can result in
4 summary eviction, if that is efficient. We certainly
5 will do that.

6 COMMISSIONER ALLAN G. RODGERS (Massachusetts):
7 I will withdraw my motion, with the understanding that
8 I may have a right to make it again if, after the
9 committee considers the matter, I am not satisfied it's
10 dealt with that issue.

11 CHAIRMAN LEINENWEBER: All right. The
12 committee will look at that issue.

13 Commissioner.

14 COMMISSIONER ROBERT H. CORNELL (California):
15 I would like an explanation of how property affords a
16 source of influence -- that is sub (5) on 107.

17 COMMISSIONER GIBSON: Shares of stock in a
18 corporation, for example.

19 COMMISSIONER CORNELL: Can you give me a fact
20 situation.

21 COMMISSIONER GIBSON: Well, that a person who
22 is engaged in dealing in drugs sets up a corporation of
23 which he is the sole stockholder and he uses that to
24 operate the entity in various ways.

25 COMMISSIONER CORNELL: What is the property

1 affording the source of influence?

2 COMMISSIONER GIBSON: The shares of stock.
3 The shares of stock enable him to control the board of
4 directors, control over who the officers are, control
5 how the corporation operates.

6 COMMISSIONER CORNELL: I don't think it's the
7 property that is creating the influence over the
8 activity here, and that concerns me. I think that
9 should be reworded. But I will think about it and
10 submit something later, if I may.

11 CHAIRMAN LEINENWEBER: The commissioner on my
12 far left.

13 COMMISSIONER PAULA TACKETT (New Mexico): Mr.
14 Chairman, just a question as to what is included on
15 Page 107, Lines 11 through 13. And if the committee
16 could help me in terms of if they think this situation
17 would be covered, or this property.

18 Property that is used in any manner to
19 facilitate conduct giving rise to forfeiture.

20 Well, the conduct giving rise to forfeiture
21 then goes back to 503, which talks about an act or
22 omission under this act.

23 Then if you go back to 403, which talks about
24 fraudulent use of a prescription, I am wondering if
25 this property would get to a doctor or a veterinarian,

1 say, who suffers from drug addiction and uses their
2 prescriptions fraudulently to get drugs, and if that
3 would then subject a lot of their practice and
4 equipment used in their practice to forfeiture.

5 CHAIRMAN LEINENWEBER: Who wishes to respond?
6 Anybody? Commissioner Gibson,

7 COMMISSIONER DAVID A. GIBSON (Vermont): I
8 think the scenario you describe could result, yes.

9 COMMISSIONER TACKETT: Thank you.

10 COMMISSIONER JAMES A. YATES (New York): Mr.
11 Chairman, if I could on that. I think the question
12 that Commissioner Tackett is addressing is: When is an
13 instrumentality -- not proceeds -- but an
14 instrumentality of an illegal act going to be
15 forfeited?

16 The language here we have used, that the
17 committee used, is the broadest possible language. It
18 says: Anything that is used or intended to be used in
19 any manner or part to facilitate conduct giving rise to
20 forfeiture.

21 Recently in New York, we passed legislation
22 that was a little more restrictive, because you have
23 got to remember, in the instrumentality area, you're
24 not talking about drug proceeds, and in many cases you
25 are not talking about property owned by the criminal.

1 You're talking about property that is used by the
2 criminal but owned by someone else, and therefore you
3 want to make very certain, when you define an
4 instrumentality, that you're defining something like a
5 plane that is used to transport drugs, something that
6 materially contributes to the commission of the crime.

7 That is why in New York, instead -- we
8 rejected the language here in this committee draft, and
9 instead we said: Property which use contributes
10 directly and materially to the commission of an offense
11 would be forfeited as an instrumentality, using the
12 language "contributes directly and materially" instead
13 of "in any way facilitates."

14 What that eliminates is, there is a lot of
15 case law in the area of incidental use of property,
16 incidental use of property to commit a crime. There is
17 case law, for instance, where a criminal may drive to a
18 scene of a crime in someone else's car and thereafter
19 may be engaged in the criminal conduct outside and away
20 from the car. The question is, do you seize the car
21 because it helped facilitate -- get the criminal to the
22 scene of the crime?

23 Under the language in this draft, the car
24 would be lost even though the owner is innocent. Under
25 the more restrictive language in New York, I would hope

1 it wouldn't be. I think that was the thrust of your
2 question, Commissioner Tackett.

3 CHAIRMAN LEINENWEBER: Further discussion?

4 COMMISSIONER PETER F. LANGROCK (Vermont): I
5 guess I am curious what the policy decision is of the
6 committee. Do you want to be able to seize the
7 innocent car, as Commissioner Yates says? I take it,
8 if a doctor gives one false prescription for his own
9 use that his entire practice, building, professional
10 building, and all, would be forfeited?

11 Do you want that policy discretion given? If
12 you do, I have some problems with it. If you don't, I
13 think it's a drafting problem.

14 CHAIRMAN LEINENWEBER: Commissioner Gibson.

15 COMMISSIONER DAVID A. GIBSON (Vermont): The
16 policy that the committee has been following is that if
17 a person engages in an activity that would be a
18 violation of this act knowingly or intentionally, that
19 not only are they subject to criminal prosecution, but
20 also their property used in that connection is subject
21 to forfeiture.

22 We have also tried to make sure that those who
23 are innocent of any involvement are not going to suffer
24 loss of their assets in that connection. But, yes, if
25 the doctor violates the law and it can be proved, then

1 those items that are used to facilitate that conduct
2 could be forfeited, subject to forfeiture. That is the
3 policy determination that this committee has made.

4 COMMISSIONER JAMES A. YATES (New York): Mr.
5 Chairman, on that point. Not necessarily so, that the
6 pharmacist would have to be the person who violated the
7 law in order to lose his practice and store. It could
8 be a clerk in the store who issued a fault prescription
9 to take care of a habit, and it could be that if the
10 owner knew about it, didn't facilitate in any way, but
11 knew about it and didn't report it to the police, that,
12 yes, he would lose his store and practice under the act
13 as it is drafted.

14 CHAIRMAN LEINENWEBER: Commissioner.

15 COMMISSIONER ROBERT H. CORNELL (California):
16 Coming back to sub (5), I wonder if the committee would
17 be willing to add in its definitions some sort of
18 definition of source of influence. That is not a
19 well-defined, understood term, and I think it leads to
20 a lot of vagueness.

21 In the absence of some definition, I would
22 move to strike (5).

23 COMMISSIONER GIBSON: We would be happy if you
24 would give us an opportunity to look at that, report
25 back, and if we are not satisfactory, then certainly.

1 COMMISSIONER CORNELL: Thank you.

2 CHAIRMAN LEINENWEBER: Further discussion.

3 COMMISSIONER TOM DOWNS (Michigan): I just
4 raise the question that, I understand in many states
5 there is a real attempt to rehabilitate the
6 professional, the doctor, the nurse, a person like
7 that, who may be using amphetamines or drugs by taking
8 away their license to use those, restricting it, and
9 trying a rehabilitation program.

10 It would seem that this is inconsistent with
11 that. I wonder if the committee has given any
12 consideration to these rehabilitation programs in the
13 various states.

14 COMMISSIONER GIBSON: Yes, there are
15 provisions in this act in Article 4 that would
16 contemplate treatment and rehabilitation options for
17 any person, whether it be a professional or other
18 individual.

19 COMMISSIONER JAMES A. YATES (New York): Mr.
20 Chairman, if I could be heard on that. The treatment
21 options that are available go to sentence after
22 conviction. They don't deal with remission or
23 mitigation, in the interest of justice, of the
24 forfeiture action. So with regard to your particular
25 question: Could a person be allowed to use as a

1 defense to a forfeiture action, where his practice or
2 store is at stake, the fact that he is undergoing some
3 treatment, the answer is: No, it's not a defense to
4 the forfeiture action itself.

5 CHAIRMAN LEINENWEBER: Commissioner.

6 COMMISSIONER PAULA TACKETT (New Mexico): I
7 would respectfully ask the committee if they would
8 reconsider their policy decision with regard to this
9 issue.

10 I think statistics show that especially
11 dealing with the medical profession, when you're
12 dealing with addiction, it can take sometimes three to
13 four years before doctors, even after they have started
14 treatment, are able to kick the habit. And this would
15 certainly be more than a one-time instance.

16 Whatever Commissioner Yates had talked about,
17 it would seem to me that if we are talking about
18 rehabilitation of the drug user, the substance abuser,
19 as opposed to forfeiting their whole business, I think
20 that is a policy question that I am not sure that the
21 conference has actually dealt with at this time, and I
22 would ask the committee to reconsider their policy
23 decision.

24 Thank you.

25 CHAIRMAN LEINENWEBER: Commissioner Langrock.

1 COMMISSIONER PETER F. LANGROCK (Vermont): I
2 think we are getting at one of the fundamental
3 underlying policy areas here which really disturbs me,
4 and that is basically that both a person who is
5 relatively minorly involved in some sort of illegal
6 drug transaction or somebody who is even innocent can
7 have their property forfeited out of all proportion to
8 the offense, and that there are no effective controls
9 or safeguards to prevent that, that basically this is a
10 situation which is a blank check for the government,
11 the state, the prosecutor, to make a determination
12 where that line is drawn.

13 And if there is something short of a blank
14 check, if there are some articulated standards to
15 protect an individual from having their property
16 forfeited by some innocence or minor violation, I'd
17 like to know where they are.

18 Because that policy -- I've got no problem
19 stopping crack houses, if that is what you want to do.
20 I have got no problem in forfeiting the big money from
21 the drug dealer. What I do have a problem with is
22 taking somebody's family farm because they find three
23 marijuana plants on it.

24 And let me tell you something. This last
25 year -- I have a farm with 300 acres in Vermont. And

1 somebody planted four marijuana plants on my farm. You
2 may say this is not something which does affect us.
3 But supposing I go through the woods with my bird dog
4 and I see a plant and I break off a stem, put it in my
5 pocket to identify it, to turn it in.

6 At that point, my entire farm, everything for
7 my family, is subject to forfeiture based upon, not a
8 standard of law, but upon some individual prosecutor's
9 choice. And maybe some prosecutors wouldn't look too
10 kindly upon me under those circumstances.

11 CHAIRMAN LEINENWEBER: Further discussion on
12 Section 504?

13 COMMISSIONER JAMES A. YATES (New York): Mr.
14 Chairman, on that point, on the point that Commissioner
15 Langrock just raised. New York has language that
16 allows a court, in the interest of justice, to modify
17 an award when -- I think the language is that the
18 forfeiture would be disproportionate to the defendant's
19 gain from the offense or the defendant's interest in
20 the property or the defendant's participation in the
21 conduct upon which the forfeiture is based.

22 I don't know if you'd accept that as an
23 amendment.

24 COMMISSIONER LANGROCK: First of all, I wanted
25 a response. Am I correct that there is no checking --

1 articulated standards in this act to protect that type
2 of forfeiture?

3 COMMISSIONER DAVID A. GIBSON (Vermont): I
4 think what you should also bear in mind is that Section
5 505 of the Uniform Controlled Substances Act as
6 presently written and approved by this conference has
7 exactly that same result contemplated in it, and that
8 while it doesn't extend to real estate at this time,
9 there is no particular reason that it shouldn't if real
10 estate is actively used in connection with a violation
11 of this law.

12 So, forfeiture, under these circumstances, is
13 not a new and different idea, and the magnitude of the
14 forfeiture is not predicated on the magnitude of the
15 offense. It's simply a matter of public policy,
16 saying: If you engage in this activity, you do so at
17 your peril because you may lose property that is used
18 in connection with that illegal activity.

19 So let's not try to put this as being an
20 entirely new and different idea of our remedies
21 available under drug prosecution. I think your example
22 of breaking off part of a leaf from a marijuana plant
23 as you peruse your farm property is a little bit
24 stretching the point, because we still have to have
25 shown that you did so in violation -- that you

1 committed a violation of the act, and under your
2 description that did not occur.

3 COMMISSIONER LANGROCK: David, maybe we were
4 fools once and didn't see it, but that can't justify
5 these draconian situations which are being put into
6 effect.

7 You know in our own state -- we had the
8 federal government try to forfeit a farm for a few
9 small plants. The publicity got so great that the U.S.
10 Attorney backed off on it.

11 I mean, these are things which are real out
12 there. One of the problems, one of the reasons why I
13 raise this -- should be a first reading -- was because
14 I think there is the policy issue. And I am going to
15 make a motion on a policy issue which goes to this
16 point. That is that the committee should attempt to
17 draft standards that are -- articulable standards that
18 will protect individuals from unlimited and
19 unreasonable forfeitures.

20 I mean, if I could just speak briefly to that.
21 I just think that the concept of the innocent person
22 losing their farm, losing their homes, losing their
23 property, or a person with the most minor of
24 violations -- maybe a strict liability violation, a
25 very small indiscretion -- is just something which is

1 not the type of work product that this conference wants
2 to turn out.

3 I can draft it. I can make suggestions from
4 the floor, but I really don't want to. This is
5 Westmoreland: Just give me more troops and I will do
6 it. I can win the war.

7 I just say that the history of our country has
8 been never to give unbridled authority to prosecution.
9 Maybe it's been lying dormant for a few years, but it
10 is not dormant any longer. I think that this
11 underlying policy is the crux of this forfeiture
12 provision.

13 Therefore, I make that motion.

14 CHAIRMAN LEINENWEBER: The motion, as I
15 understand it, commissioner, is that it is the sense of
16 the House that the committee be directed to draft a
17 provision setting forth articulable standards
18 protecting an individual from unlimited and
19 unreasonable forfeitures.

20 Did I state it correctly?

21 COMMISSIONER LANGROCK: Perfectly.

22 CHAIRMAN LEINENWEBER: Is there discussion on
23 that motion? Commissioner Langbein.

24 COMMISSIONER JOHN H. LANGBEIN (Illinois): In
25 that connection, I would like to say that there is a

1 well-established criterion of good criminal
2 policy-making, which is the familiar principle of
3 proportionality that Beckareeya enunciated a little
4 over 200 years ago, and which has been understood in
5 the main works of criminal legislation, the Model Penal
6 Code and others, for quite some time.

7 I take Commissioner Langrock's motion to be
8 nothing more than an attempt to bring that to bear
9 here.

10 Now, I gather that you don't have to look very
11 far to find the model and that the New York language
12 that Commissioner Yates was referring to does the job.
13 And so, my question to the committee is, what is wrong
14 with the New York language. Do you really want to
15 resist that? Do you really want to resist the
16 principle of proportionality as it applies to the
17 potential for grossly exaggerated forfeiture
18 consequences for relatively innocuous breaches of this
19 area of criminal jurisprudence?

20 CHAIRMAN LEINENWEBER: I will call upon the
21 committee to respond both to the motion and to the
22 inquiry from Commissioner Langbein.

23 Who wishes to do that?

24 COMMISSIONER DAVID A. GIBSON (Vermont): All I
25 can say in response, Commissioner Langbein, is that

1 this has been the policy that the committee has
2 operated under. Obviously, the conference can redirect
3 us, if it so chooses, and we welcome this debate on
4 this question.

5 CHAIRMAN LEINENWEBER: Commissioner Morse.

6 COMMISSIONER JOSHUA M. MORSE, III (Florida):
7 Just a question of inquiry, point of inquiry. I don't
8 think I have ever gotten a straight answer here of the
9 point that was raised by the commissioner from New
10 York. That is, can an innocent person's property be
11 forfeited under this act?

12 COMMISSIONER JAMES A. YATES (New York): Yes,
13 if he knew. As a broad answer. I mean, there are a
14 lot of exemptions and exceptions. As a general rule,
15 if he knew of the conduct, even though he has had no
16 criminal liability himself.

17 CHAIRMAN LEINENWEBER: Further discussion.
18 Commissioner.

19 COMMISSIONER FRED H. MILLER (Oklahoma): I
20 would like to ask the committee a question, too.
21 According to some material that was disseminated to us,
22 apparently the Justice Department has issued guidelines
23 that cover this disproportionality point as well as
24 several others.

25 If that is the guideline under the federal

1 act, why are we deviating under the state act?

2 CHAIRMAN LEINENWEBER: Commissioner Gibson.

3 COMMISSIONER GIBSON: Commissioner Miller,
4 with all due respect, I think that is a rhetorical
5 question.

6 CHAIRMAN LEINENWEBER: Commissioner Bonfield.

7 COMMISSIONER ARTHUR E. BONFIELD (Iowa): I
8 guess I simply don't understand, listening to this
9 debate -- the committee has been asked a direct
10 question. Why does the committee resist the concept of
11 proportionality, which most of us have taken as a basic
12 predicate of fair jurisprudence in most areas of the
13 law in this area? Why?

14 COMMISSIONER GIBSON: I thought I had answered
15 that question, commissioner. I will try again. The
16 feeling of the committee, the policy of the committee
17 at this point in time is that if a person knowingly or
18 intentionally engages in illegal conduct, then the
19 property utilized or derived from that illegal conduct
20 under this act should be forfeited because of the
21 underlying policy of the act all together. The
22 controlled substances should in fact be controlled,
23 should not be illicitly dealt in, and should not --
24 because of the major problems resulting from illegal
25 drug and substance abuse, it's the policy of the

1 committee at this point in time, subject to being
2 redirected by this conference as a whole, that such
3 activity deserves to have the person derive no benefit,
4 monetarily or otherwise, from that activity.

5 COMMISSIONER BONFIELD: With all due
6 deference -- can I respond? I asked a question.

7 CHAIRMAN LEINENWEBER: You may respond.

8 COMMISSIONER BONFIELD: With all due
9 deference, I don't think you have answered the
10 question. You're talking on the one hand of benefits
11 realized from the transaction. What we are talking
12 about is the question of a disproportionate forfeiture
13 that does not simply go to benefits obtained.

14 The example was given earlier of a farm where
15 three marijuana plants may be grown. Now, the question
16 is the proportionality. We are not talking about the
17 question of benefits. I think very few people would
18 object to the question of forfeiting any and all
19 benefits that may be achieved. The question is whether
20 those three plants, which may have even been planted by
21 someone else on the property, why the whole farm should
22 be forfeited and why that isn't disproportionate where
23 that is not the grower but the person might have had
24 knowledge that the plants existed on his or her farm.

25 CHAIRMAN LEINENWEBER: The commissioner over

1 here in the middle.

2 COMMISSIONER SHAUN P. HAAS (Wisconsin): I
3 rise to support Commissioner Langrock's motion. But
4 because I think it will fail, if it's proper at this
5 time, I'd also like to rise to amend the motion to
6 direct the committee to incorporate a provision in the
7 act based on the New York language that Commissioner
8 Yates read. I think that is understandable, clear, is
9 something we can vote on, up or down, rather than a
10 direction that I think will lose.

11 CHAIRMAN LEINENWEBER: Commissioner Langrock,
12 do you accept the amendment, sir?

13 COMMISSIONER PETER F. LANGROCK (Vermont): I
14 really believe that this body will not tolerate an act
15 which goes out without any sense of proportion. I
16 disagree. I think this is a winner.

17 [Laughter]

18 COMMISSIONER LANGROCK: I have lost a lot of
19 them, but I can't believe this conference wants to send
20 something out which has unlimited power in the hands of
21 an individual, with no judicial controls on it. I
22 can't believe that.

23 As far as -- the reason I drafted this way was
24 that New York may be good, there may be something
25 better. I don't know. But I did not want to tie the

1 committee's hands on that.

2 COMMISSIONER REID C. PIXLER (Colorado): I
3 would like to try to address some of the questions, and
4 also there were a number of questions that were
5 directed to the standards of the federal procedures
6 that are involved. Harry Harbin from the Department of
7 Justice is here, and I would like him to address those
8 questions, and I'd like to answer a few of the
9 questions as well.

10 MR. HARRY HARBIN: The status of federal civil
11 forfeiture law is that proportionality challenges have
12 been made in virtually every circuit and have been
13 unanimously rejected in civil forfeiture actions.

14 The policy underlying that is that if someone
15 is using their real property to cultivate marijuana,
16 they're usually using the entire property, part of it
17 to conceal the operation, and the rest of it to conduct
18 the actual manufacturing itself.

19 So that if someone has a hundred-acre farm,
20 uses ten of the acres to cultivate marijuana, the rest
21 of acreage may be used to raise corn, which also
22 happens to conceal the marijuana from all the aerial
23 surveillance.

24 The same thing with a car. You don't end up
25 with -- someone transports drugs in the trunk of their

1 car, we don't end up with the trunk of the car. We end
2 up with all four wheels.

3 Similarly, if someone is using a business
4 front to launder money, we don't end up with an
5 easement that goes from the front door to the counter,
6 where the money is delivered. We end up with the
7 business.

8 The purpose of forfeiture is to remove the
9 economic base of crime. Now, it's true what
10 Commissioner Sullivan pointed out, that there are
11 guidelines from the Department of Justice. Those
12 guidelines which speak to proportionality deal with
13 pretrial restraining orders in RICO criminal cases.
14 That is all they deal with. They do not deal with
15 civil forfeiture. They do not deal with criminal drug
16 forfeiture. They deal with only pretrial restraining
17 orders, not ultimate orders of forfeiture in criminal
18 RICO cases.

19 So, I just want to clarify what federal law is
20 for the benefit of the commission. Thank you.

21 CHAIRMAN LEINENWEBER: Commissioner Pixler,
22 did you wish to add?

23 COMMISSIONER REID C. PIXLER (Colorado): Yes,
24 please. The question about innocent owners is somewhat
25 of an anomaly as well, in terms of the forfeiture

1 statutes don't rely upon the finding of guilt or
2 innocence in a criminal action. So, what we are
3 talking about is whether they have committed one of the
4 conducts, one of the specified things that give rise to
5 forfeiture. So, it's not someone that is just walking
6 around that finds three or four marijuana plants on
7 their farm and puts them in their pocket. That isn't
8 going to be conduct that gives rise to the forfeiture.
9 It's not going to be subject to the forfeiture of that
10 land unless the evidence is established to establish
11 that, in effect, that person is participating in a
12 transaction and using that real estate in the
13 commission of some cultivation offense or concealing of
14 the acts that he is allowing to be promulgated on his
15 property.

16 The other concept -- I mean, if you are trying
17 to look at proportionality, you've got somebody that
18 actually puts 20 percent of the corn crop in marijuana,
19 and we seize the little doughnut holes around there,
20 make the property look like swiss cheese? It is not
21 possible to deal with proportionality in that respect.

22 The thing that you are looking to is the
23 conduct, the actions, the intentions, and the actions
24 of the party that owns the property or that controls
25 the property for his principal.

1 COMMISSIONER JAMES A. YATES (New York): Mr.
2 Chairman, on that point. I may have been laboring
3 under a huge misconception, and if Commissioner Gibson
4 and Commissioner Pixler are right, and the only person
5 that can lose property is the person who has committed
6 a crime, then I think a lot of my feelings about this
7 act are different.

8 Of course, we have to clarify the language,
9 because it's not written that way in the draft you have
10 before you. But I take it if that is what Commissioner
11 Gibson and Commissioner Pixler feel is what we voted
12 for, then, you know, we will fix it up as a
13 clarification.

14 CHAIRMAN LEINENWEBER: Commissioner.

15 COMMISSIONER ELLEN DYKE (District of
16 Columbia): We have talked about committing a crime,
17 talked about participating, talked about things other
18 than the probable cause standard.

19 It's my understanding that you could have a
20 forfeiture if probable cause is proved, not if a crime
21 was committed. I mean, is that not true? I mean,
22 under this substitute, we have a remedy prior to any
23 conviction, that remedy being forfeiture for the proof
24 of probable cause, and that we shouldn't be talking in
25 terms of someone having intentionally and knowingly

1 done something or participated in something or having
2 committed anything here, but that there is probable
3 cause to believe that something has occurred.

4 COMMISSIONER PIXLER: Correct. The standard
5 has always been probable cause to believe that a crime
6 was committed. And the things we are talking about
7 here in terms of conduct giving rise to forfeiture,
8 that is the effort that has to be established to shift
9 the burden of proof. That has been the standard of
10 forfeiture law for 200 years.

11 COMMISSIONER DYKE: I don't argue with that
12 being the law, but I think it's slightly disingenuous
13 to talk about people who have committed crimes are the
14 ones that are going to be affected by a forfeiture law,
15 and, in fact, if someone does have possession of
16 marijuana plants, and marijuana plants are growing on
17 his property, that might be probable cause for a
18 possession here.

19 I think you have to talk about it in terms of
20 that. I don't quite care one way or another how you
21 come out on that decision. That will be a vote taken,
22 and you will come out either way. But to talk about it
23 in terms that are anything more than probable cause, I
24 believe is wrong.

25 CHAIRMAN LEINENWEBER: Commissioner.

1 COMMISSIONER ROBERT J. TENNESSEN (Minnesota):
2 I just wanted to follow up. The chairman of the
3 committee made a statement about what the policy was,
4 and he clearly stated it was premised upon the
5 commission of a crime.

6 How do you square that with the language we
7 were just talking about? Because the forfeiture has
8 nothing to do with the crime. You don't have to prove
9 a crime. You can lose all your property and there is
10 no sense of proportionality. I fail to understand your
11 answer.

12 CHAIRMAN LEINENWEBER: Commissioner Gibson.

13 COMMISSIONER DAVID A. GIBSON (Vermont):
14 Commissioner, in order for property to be subject to
15 forfeiture, you have to have conduct giving rise to
16 forfeiture. That conduct is spelled out in Section
17 503, and it clearly contemplates violations of an act
18 that would be a felony in violation of this act.

19 Now, in terms of proving that that conduct has
20 in fact taken place, yes, the other commissioner is
21 correct, that the state may undertake the proof of
22 forfeiture by showing probable cause that in fact this
23 conduct in violation of the act had taken place and
24 that this property that is being subjected to
25 forfeiture was either used or derived or somehow

1 associated with that criminal conduct of which probable
2 cause has been shown.

3 The innocent person may come in and assert
4 that the interest that they have in the property should
5 not be forfeited because they had no knowledge, did not
6 participate, did not engage in any criminal conduct;
7 and, except for the provision relating to the car owned
8 jointly by persons, should prevail in having their
9 innocent interest protected from forfeiture.

10 But, yes, there are a lot of other concepts
11 involved in connection with the forfeiture, but,
12 broadly speaking, forfeiture is to apply only to those
13 who have in fact committed a violation. The standard
14 of proof of that under forfeiture is to show probable
15 cause, following which the person who is resisting the
16 idea of forfeiture certainly has an opportunity to
17 present evidence to show that in fact they did not
18 engage in such conduct and therefore their property
19 should not be forfeited.

20 Perhaps I spoke with too broad a brush
21 earlier, but certainly the underlying concept is that
22 in order to forfeit property, there has to be criminal
23 activity.

24 COMMISSIONER TENNESSEN: Commissioner, we are
25 a border state, and under zero interdiction type of

1 policy, there were all kinds of vehicles being seized
2 at the border with Canada for people having a small
3 amount of marijuana perhaps in a tackle box that
4 belonged to a passenger in the vehicle. There seemed
5 to be no sense of proportionality to that.

6 Secondly, in terms of the prosecutorial
7 discretion on this issue, I am troubled by that a great
8 deal, especially with the federal government. And to
9 use a horrendous example, the Noriega case. Here is a
10 scoundrel -- all his property was seized, and it was
11 seized on the grounds that he had obtained it from
12 illegal activities.

13 He may well have. However, part of that
14 illegal activity was a payroll, being on a payroll of
15 the CIA. And only when the government was forced --
16 and the judge forced the government to admit that --
17 either cough up the amount that was paid to him, which
18 the government didn't want to do -- they then released
19 some of the funds.

20 But, you know, I am not comforted at all that
21 in this day in the United States of America we have to
22 go to such an extent to deal with a crime where we are
23 taking people's property out of all proportion to what
24 has occurred.

25 CHAIRMAN LEINENWEBER: On the motion,

1 Commissioner Langbein.

2 COMMISSIONER JOHN H. LANGBEIN (Illinois):
3 Commissioner Miller of Oklahoma made reference a minute
4 ago to the Department of Justice guidelines on this
5 subject. The Department of Justice representatives
6 whisked him away. I would like to read you what the
7 actual language is, is just a sentence or so, the key
8 sentence. It says: "In ordering a forfeiture or
9 entering a restraining order or injunction, the court
10 shall consider the nature and severity of the offense
11 and shall ensure that the effect of the property
12 restraint is not disproportionate to the defendant's
13 conduct."

14 And in there are some similar conditions,
15 restraining orders and injunctions.

16 Now, true, this is language which was
17 developed for the area which thus far has been the main
18 area of forfeiture practice in the federal criminal
19 area, which is the racketeering stuff under RICO. I
20 grant you that. But this is admirable language when
21 transposed to the identical risk which we are now
22 looking at.

23 And I am just speechless that this model from
24 the federal government's own practice is resisted by
25 this committee. This is utterly ordinary, reasonable

1 high policy followed by our own Justice Department in
2 other circumstances. We ought to follow it here.

3 CHAIRMAN LEINENWEBER: The Commissioner on my
4 far left.

5 COMMISSIONER DONALD E. MIELKE (Colorado): To
6 the comment regarding what the Justice Department has
7 as far as policy, I would not mind if the committee put
8 that into a comment following this section as to the
9 meaning. But, again, Congress did not enact it as
10 federal law. Neither have any of our states other than
11 New York, and maybe the committee can correct me. I
12 know of no other state that has cut back or limited
13 proportionality to that extent.

14 Most all of your states have a forfeiture act,
15 and that forfeiture act has the general words, and I
16 don't think there is any state court, even, besides the
17 federal courts, that have made a ruling as to
18 proportionality to that sense. If the crime was
19 committed, if the property was used in the commission
20 of a violation of the Controlled Substance Act, then
21 the property is forfeited.

22 So, I would urge the committee possibly to
23 include a comment and possibly follow those guidelines,
24 but I don't think we want that in black letter law, and
25 I'd urge a "no" vote.

1 CHAIRMAN LEINENWEBER: Commissioner Morse on
2 the motion.

3 COMMISSIONER JOSHUA M. MORSE, III (Florida):
4 Another point of inquiry. Suppose that Langrock Acres
5 amounted to something like a Texas ranch, 10,000,
6 20,000 acres, and you had marijuana growing with the
7 owner's knowledge in one corner on a quarter of an acre
8 patch. I take it then that the entire 100,000 acres,
9 or whatever the size of the ranch was, could be
10 forfeited.

11 COMMISSIONER REID C. PIXLER (Colorado): Yes.

12 CHAIRMAN LEINENWEBER: The answer is "yes."

13 COMMISSIONER MORSE: Is there an exemption for
14 the U.S. government? Suppose a state were to bring a
15 forfeiture action against the Forestry Service.

16 [Laughter]

17 COMMISSIONER DAVID A. GIBSON (Vermont): Thank
18 you. There is no exemption for the federal government
19 if they commit a crime.

20 COMMISSIONER MORSE: So, in the Noriega case,
21 transposing slightly, you could forfeit a national
22 forest.

23 CHAIRMAN LEINENWEBER: Commissioner -- the
24 answer is "yes," I guess. Commissioner.

25 COMMISSIONER HARVEY S. PERLMAN (Nebraska): I

1 am becoming slightly confused on the proportionality
2 discussion because the gentlemen at the table defined
3 it, I think, differently than any of the proposals.

4 I take it proportionality does not mean that
5 if you have one row of marijuana and one row of corn,
6 that the government could only seize the one row of
7 marijuana.

8 The New York language, as I understand it, has
9 two or three factors that the court is to consider when
10 they look at a forfeiture. Now, you can do it two
11 ways. I mean, you have provisions in here that are
12 fairly broad, authorizing forfeiture in a variety of
13 cases in which, A, no crime has been -- at least no
14 conviction has occurred -- people may not be directly
15 involved but merely have knowledge.

16 I wonder why the committee resists the ability
17 of a court to modify a forfeiture award if it thinks,
18 in relationship to all of these other factors, that it
19 is disproportionate.

20 COMMISSIONER GIBSON: The simple answer,
21 commissioner, is that that point was discussed by the
22 committee, was voted on by the committee, and the
23 resulting vote is reflected by our draft. So, we
24 considered it, and a majority voted as is, as
25 presented, and that is the view that is being

1 presented.

2 COMMISSIONER MICHAEL FRANCK (Michigan): I
3 rise to move the previous question.

4 CHAIRMAN LEINENWEBER: Any further discussion
5 on the motion?

6 Commissioner Langrock, to close. Do you wish
7 to close? Do you wish to waive closure?

8 COMMISSIONER PETER F. LANGROCK (Vermont):
9 Waive closing.

10 CHAIRMAN LEINENWEBER: The motion is that it
11 be the sense of the House that the committee draft
12 articulable standards protecting individuals from
13 unlimited and unreasonable forfeitures.

14 All those in favor of the motion, signify by
15 saying "aye."

16 Those opposed, no.

17 It appears that the "ayes" have it. The
18 motion carries.

19 Any further discussion on Paragraph 504?
20 Seeing none, we will move to the reading of Section
21 505.

22 COMMISSIONER JAY BURINGRUD (North Dakota):
23 Moving right along.

24 "SECTION 505. PROPERTY EXEMPT FROM
25 FORFEITURE.

1 "(a) Property is exempt from forfeiture under
2 this [Article] if:

3 "(1) the owner or interest holder, at the time
4 of acquisition of the property, did not know or have
5 reason to know that the conduct making the property
6 subject to forfeiture:

7 "(i) was likely to occur, and, before the
8 conduct making the property subject to forfeiture,
9 either did not permit the property to be in the control
10 of the person whose conduct has made the property
11 subject to forfeiture with knowledge or reason to know
12 that the conduct was likely to occur, or acted
13 reasonably to attempt to prevent the occurrence of the
14 conduct; or

15 "(ii) had already occurred, provided that the
16 owner or interest holder acquired the property in good
17 faith, for value, and in the ordinary course of
18 business or for ordinary personal, family, or household
19 purposes; or

20 "(2) the person whose conduct gave rise to its
21 forfeiture did not have the authority to convey the
22 property of the person claiming the exemption to a good
23 faith purchaser for value or a buyer in the ordinary
24 course of business at the time of the conduct.

25 "(b) Property is not exempt from forfeiture

1 under this [Article], even though the owner or interest
2 holder lacked knowledge or reason to know that the
3 conduct making the property subject to forfeiture was
4 likely to occur; if:

5 "(1) with respect to a conveyance for
6 transportation, the owner or interest holder holds the
7 property jointly or in common or [as tenants by the
8 entirety] [or in community] with the person whose
9 conduct has made the conveyance subject to forfeiture;

10 "(2) the owner or interest holder received
11 substantial benefits, proportionate to the value of the
12 owner's or interest holder's property, from the conduct
13 making the property subject to forfeiture, unless the
14 benefits were received in the ordinary course of
15 business;

16 "(3) the owner or interest holder holds the
17 property for the benefit of or as nominee for the
18 person whose conduct has made the property subject to
19 forfeiture; or

20 "(4) the owner or interest holder is
21 criminally responsible for the conduct giving rise to
22 forfeiture, whether or not there is a prosecution or
23 conviction.

24 "(c) Property acquired in good faith by a
25 lawyer as payment for legal services or reimbursement

1 of expenses related to legal services, in defense of a
2 person who has been or may be charged with an offense
3 under this [Act], is exempt from forfeiture under this
4 [Article] to the extent the payment or reimbursement
5 was reasonable and was earned [(alternative 1) before
6 judicial determination that the property is subject to
7 forfeiture] [(alternative 2) before the owner or
8 interest holder obtained actual knowledge that the
9 property was subject to forfeiture. The state has the
10 burden of producing evidence of actual knowledge].

11 "(d) To be eligible for an exemption under
12 this section, an owner or interest holder must be in
13 substantial compliance with any statute requiring its
14 recordation or reflection in public records in order to
15 perfect the interest in the property against a good
16 faith purchaser for value."

17 CHAIRMAN LEINENWEBER: Is there discussion on
18 this section? Commissioner.

19 COMMISSIONER PAULA TACKETT (New Mexico): On
20 Page 109, property that is not exempt from forfeiture.
21 Would the committee respond to if this deals with the
22 situation of a spouse who is married to a pusher who is
23 also a substance abuser and who then loses the only
24 family car they have, and she is trying to support a
25 family while he is out pushing drugs?

1 Would this take care of the family car, Mr.
2 Chairman?

3 CHAIRMAN LEINENWEBER: Anybody wish to respond
4 to that question? Who wishes to respond?

5 COMMISSIONER REID C. PIXLER (Colorado): The
6 family car that is in joint ownership would not be
7 exempt from forfeiture.

8 COMMISSIONER TACKETT: Thank you, Mr.
9 Chairman.

10 COMMISSIONER JAMES A. YATES (New York): Mr.
11 Chairman, on that point. I think you have to realize
12 what the paragraph that Commissioner Tackett pointed
13 out does, is that it's an exemption to the general rule
14 that an innocent person can still lose property if he
15 or she knows about the criminal activity of the other
16 person.

17 In this case, the example you're talking
18 about, it could be a husband and wife where the wife
19 had no idea that the husband was carrying drugs in the
20 car and she could prove it, and even though she could
21 prove she had no idea that the husband had drugs in the
22 car, she loses her interest.

23 COMMISSIONER PIXLER: I would like to expand
24 on that. The reason is that drug dealers will never
25 own cars. They will put it in somebody else's name,

1 family names. They will use the cars themselves to do
2 their drug trafficking, arriving at their plants,
3 locations for their exchanges, but they won't be doing
4 it in items of their own ownership.

5 So, the purpose is to seize and forfeit
6 anything that is within these titles of (b)(1).

7 COMMISSIONER TACKETT: Mr. Chairman, if I
8 might respond to that. I think I would respectfully
9 disagree with regard to what I would call perhaps a
10 little lower-level drug pusher than the kind that the
11 gentleman may be referring to.

12 It may be true that if you're dealing with the
13 major players in the drug cartel, that might be the
14 case. But if you would think about some of the
15 lower-level drug pushers who are out there, they may
16 not be quite so sophisticated and they may have joint
17 tenants with their spouses.

18 CHAIRMAN LEINENWEBER: The Commissioner over
19 here on my right.

20 COMMISSIONER ALLAN G. RODGERS (Massachusetts):
21 I wanted to ask the committee to explain the breadth of
22 (a)(2), the exemption. It appears to say, and my
23 question is, structurally, is that meant to be a
24 blanket exemption so that if somebody satisfied that
25 criteria, the property would be exempt regardless of

1 anything else in the act, or is that more limited than
2 it appears? I have been trying to puzzle through to
3 understand what that means.

4 COMMISSIONER DAVID A. GIBSON (Vermont):
5 Commissioner, that is, as drafted, a blanket exemption,
6 so that if the person who may have done the bad act was
7 in a position to somehow convey property to another
8 person but in fact did not have the authority to do so,
9 then the owner of the property would not lose that
10 property.

11 COMMISSIONER JAMES A. YATES (New York): On
12 that point. Maybe I am wrong, but I read paragraph (b)
13 there as being an exception to that exemption, so that
14 the four paragraphs there describing different
15 situations where a person would lose property,
16 notwithstanding the fact that they qualified for an
17 exemption under (2), means that it's not a blanket
18 exemption. It's subject, I think, to the four listings
19 in paragraph (b).

20 CHAIRMAN LEINENWEBER: All right.
21 Commissioner Langbein.

22 COMMISSIONER JOHN H. LANGBEIN (Illinois): I
23 would like to move that (b)(1) be struck. And (b)(1)
24 is this provision that Commissioner Tackett was
25 referring to where the automobile can be seized

1 notwithstanding the fact that the owner has no
2 knowledge whatever -- the co-owner, in this instance --
3 a spouse or parent has no knowledge whatever of the
4 criminal conduct.

5 Now, that is simply indefensible. You have
6 legislated -- you have simply presumed guilt. The
7 scenario that is recited is, the wrongdoer will use
8 somebody else as a co-owner of the vehicle in order to
9 escape detection. Good. That is one possibility.
10 Another possibility is that a completely innocent
11 person has her or his vehicle used by a spouse or
12 parent or brother or some other form of co-owner. And
13 this is just plain Stalinist criminal justice, to
14 presume guilt in these circumstances. We don't presume
15 guilt. We don't forfeit stuff unless the conduct has
16 actually been proved.

17 I respectfully request that (b)(1) be struck.

18 CHAIRMAN LEINENWEBER: The motion is, on Page
19 109, to strike subparagraph (1) of paragraph (b) of
20 Section 505.

21 On the motion. Discussion on the motion.
22 Over here on my right.

23 COMMISSIONER FRED H. MILLER (Oklahoma):
24 Perhaps it would help me in determination how to vote
25 on this motion if I could get some idea of the breadth

1 of this (b)(1).

2 It says, " . . . the owner or interest holder
3 holds the property jointly or in common . . ."

4 Does that include a lease? Does that include
5 a secured transaction?

6 COMMISSIONER DAVID A. GIBSON (Vermont): No.

7 COMMISSIONER MILLER: How do you arrive at
8 that, Dave?

9 COMMISSIONER GIBSON: What we are talking
10 about is --

11 COMMISSIONER MILLER: I know what you mean.

12 COMMISSIONER GIBSON: Joint holding. As I
13 understand leasehold, you have a lessor/lessee
14 arrangement. That is not a joint ownership. It's not
15 an ownership in common. As I understand the secured
16 party, you have a lien interest. It's not a joint
17 holding of title to property. That is why I answered
18 "no."

19 COMMISSIONER MILLER: I agree with you, but
20 that is not what the statute says. It says the owner
21 or interest holder holds the property jointly. It
22 doesn't say they own the property jointly.

23 CHAIRMAN LEINENWEBER: Further discussion on
24 the motion? Commissioner.

25 COMMISSIONER MICHAEL D. HAWKINS (Arizona): I

1 have a question and subquestion. The question is, is
2 this meant to apply to community property?

3 COMMISSIONER GIBSON: Yes. We have bracketed
4 language in there for those states that would be
5 community states.

6 COMMISSIONER HAWKINS: A quick hypothetical,
7 and this is to help me vote on the motion. Wife buys
8 car in her name. Husband deals drugs without her
9 knowledge. Under traditional community property
10 concepts, he would own half that car unless there was a
11 disclaimer of some kind.

12 Would the car be subject to forfeiture?

13 COMMISSIONER GIBSON: The short answer is
14 "yes."

15 COMMISSIONER HARRY M. WALSH (Minnesota): I
16 congratulate Commissioner Langbein on figuring out what
17 this paragraph means. I gather "by conveyance for
18 transportation," you mean the conveyance of an interest
19 in transportation?

20 COMMISSIONER GIBSON: Conveyance for
21 transportation can be an automobile, airplane, train,
22 boat, whatever you want.

23 COMMISSIONER WALSH: You might consider saying
24 something like that in the draft.

25 [Laughter]

1 COMMISSIONER WALSH: Similarly, on Line 15, I
2 don't know how a conveyance can be subject to
3 forfeiture. Conveyance is a legal act. If it is the
4 object that is being conveyed, you should say that.

5 COMMISSIONER GIBSON: That is why we put in
6 the words "for transportation," to get away from the
7 concept that this was somehow a land transaction or
8 deed or other instrument of conveyance.

9 COMMISSIONER WALSH: Why don't you say the
10 vehicle subject to forfeiture, something like that.

11 CHAIRMAN LEINENWEBER: Further discussion on
12 the motion. Does anybody wish to discuss the motion?

13 Seeing no more discussion, the motion of the
14 commissioner from Illinois is that subparagraph (1) of
15 paragraph (b) of Section 505 be stricken.

16 All those in favor, signify by saying "aye."

17 All those opposed.

18 The "ayes" have it. The motion carries. The
19 subparagraph is stricken.

20 Further discussion on Section 505.

21 Commissioner.

22 COMMISSIONER ROBERT H. CORNELL (California):
23 I'd like the committee to consider if there is some way
24 of tightening up the language, "have reason to know,"
25 which appears at the beginning of sub (1) with respect

1 to the owner or interest holder.

2 I will give you an example. It happened in
3 our office last week. We had a call from a bank up in
4 Oregon. A young couple was buying a home. Based on
5 their income and so forth, they did not qualify, except
6 they had a very large down payment.

7 The bank was questioning where they got their
8 down payment, which came from a personal injury
9 recovery.

10 Question. If this bank did not make that kind
11 of inquiry, and here is a young couple without the kind
12 of income that would produce the \$25,000 down payment,
13 whatever it was, would they have -- it's a
14 hippy-looking couple. Would they thereby have some
15 reason to know, and later on the property be forfeited
16 from -- the interest forfeited by the government?

17 True, their security interest might have some
18 protection, but the level of security, of course, would
19 be reduced tremendously.

20 With reason to know, and since the burden is
21 on the -- this is an exemption. The burden is really
22 on the interest holder or the owner. It seems to me
23 that that could be very vague. I think it should be
24 made stricter.

25 COMMISSIONER DAVID A. GIBSON (Vermont): The

1 committee has sympathy with the problem that you have
2 put your finger on. We do not believe that our
3 language has reason to cause the bank to be in
4 difficulty in that circumstance.

5 If, however, the down payment were brought in
6 a couple of paper bags of one dollar bills, or
7 whatever, it might raise some question that the bank
8 should take a look at.

9 It's difficult to craft language that would
10 address this particular problem, and that is why we
11 settled on the "reason to know," thinking that it's got
12 to be something more than just the bank failing to make
13 an inquiry that it might have made in hindsight later
14 on, that it's got to have a little more to it in terms
15 of, like a willful blindness or something of that sort.

16 COMMISSIONER CORNELL: Let me ask this
17 question. Since this is an exemption, is the burden on
18 the owner or interest holder to prove that they did not
19 know?

20 COMMISSIONER GIBSON: Yes, that is the way
21 that would work.

22 COMMISSIONER CORNELL: In that case, wouldn't
23 knowledge then be adequate? Because they have to prove
24 they didn't have knowledge, and you'd have
25 circumstantial evidence, perhaps in the case you bring

1 in where the person has, you know, several suitcases
2 full of cash.

3 COMMISSIONER GIBSON: We are trying to avoid
4 the situation of actual knowledge being the standard
5 here. Because we do think there might be instances
6 where the banker just was so totally blind or willfully
7 blind to a situation where they should have asked, that
8 they shouldn't be entitled to rely on that kind of a
9 process to claim their exemption.

10 So, that is the reason that we have "reason to
11 know" in there. If you have some better language to
12 address this, we'd be happy to consider it.

13 COMMISSIONER CORNELL: If I can get back to
14 you before the act is over, I will do so.

15 COMMISSIONER JAMES A. YATES (New York): Mr.
16 Chairman, on that point. I know the question was asked
17 whether or not banks felt comfortable with the language
18 the way we have it drafted. This was an issue of
19 debate in New York recently. The savings banks
20 association as well as the real estate board opposed
21 language proposed by the governor which had "reason to
22 know" language in it, and we adopted finally an actual
23 knowledge standard.

24 I think that is all the more critically
25 necessary here, where the negative has to be proved.

1 In fact, the banker, the realtor has to come in and
2 prove the negative -- that is, that they did not know.

3 Now, at one point, Commissioner Gibson
4 referred to willful blindness being an issue that we
5 wanted to try and cover. The federal government, I
6 think, recently amended federal law to use the term
7 "willful blindness." Maybe in the search for better
8 language, if we had direction from the conference here
9 or the Committee of the Whole, what we should do is go
10 back and eliminate "reason to know" and require either
11 actual knowledge or a showing of willful blindness.

12 CHAIRMAN LEINENWEBER: Commissioner.

13 COMMISSIONER WILLIS E. SULLIVAN, III (Idaho):
14 Just a point of clarification for my own benefit. On
15 Page 109, (b)(2), I am confused by the last line of
16 that paragraph, "unless the benefits." Are we
17 referring back up to substantial benefits and are we
18 talking about the ordinary course of the innocent
19 party's business or are we talking about the ordinary
20 course of the drug business?

21 CHAIRMAN LEINENWEBER: Commissioner Gibson.

22 COMMISSIONER GIBSON: The ordinary course of
23 business would be the owner or interest holder, and the
24 benefits received would be the reference back to the
25 substantial benefits.

1 CHAIRMAN LEINENWEBER: Commissioner.

2 COMMISSIONER MILLARD H. RUUD (Texas): Let me
3 direct your attention to subsection (d). I believe I
4 understand the reasons why the committee drafted this
5 provision in the form that it is. It does provide
6 external proof of the existence of the security
7 interest.

8 I gather the operation of the rule would be
9 like this: Joe's TV store sells a TV, takes a purchase
10 money security interest under circumstances that would
11 require filing to perfect it, decides not to file, and,
12 therefore, doesn't perfect, and so you don't have the
13 evidence that there is a real security interest on any
14 kind of public record.

15 But I think the provision goes too far. It
16 makes of the government, I gather, the substance of a
17 good faith purchaser, if I understand it correctly. I
18 think that is unnecessary. You have a totally innocent
19 secured party who has done nothing wrong or nothing
20 illegal. There are times in which you don't -- for
21 various reasons, you will not file a financing
22 statement.

23 Do I correctly understand the section, Mr.
24 Chairman? Understanding the section to be that way, I
25 then move to delete subsection (b).

1 CHAIRMAN LEINENWEBER: The motion is to delete
2 what?

3 COMMISSIONER RUUD: All of subsection (d), "d"
4 as in dog.

5 CHAIRMAN LEINENWEBER: "D" as in dog or "b" as
6 in boy?

7 COMMISSIONER RUUD: Page 110, bottom of the
8 page.

9 CHAIRMAN LEINENWEBER: There is a motion then
10 from the commissioner from Texas to delete subparagraph
11 (d) on Page 110 comprising Sections 16 through 21.

12 Does the commission wish to respond to the
13 motion? Commissioner.

14 COMMISSIONER GIBSON: Commissioner Ruud,
15 you're correct in your analysis of subsection (d). At
16 first I thought you were talking about subsection (b),
17 so I was a little bit slow to react. But, yes, if the
18 interest holder has an interest by virtue of a security
19 interest, this provision would say you don't get your
20 exemption unless you have taken steps to try to perfect
21 that, and it's designed to -- the reason it is in there
22 is to protect the person who may have recorded but done
23 it in the wrong location so it wasn't effective, but
24 they substantially tried to comply. But you're
25 absolutely correct in your analysis.

1 CHAIRMAN LEINENWEBER: What is the
2 commission's position on the motion, which is to strike
3 (d)?

4 COMMISSIONER GIBSON: The committee is
5 opposed.

6 COMMISSIONER JUSTIN L. VIGDOR (New York):
7 Vigdor from New York.

8 CHAIRMAN LEINENWEBER: On the motion.

9 COMMISSIONER FRED H. MILLER (Oklahoma): Can I
10 ask the committee's response? If we did away with (d),
11 how does that relate with the definition of interest
12 holder in 501, which requires perfection in order to be
13 an interest holder at all?

14 COMMISSIONER GIBSON: You're absolutely
15 correct, that definition of interest holder would
16 revert to the language in the definition section.

17 COMMISSIONER MILLER: If I can push that just
18 for a minute, Dave. Is what you're saying that to be
19 an interest holder, you have an absolute perfection
20 rule, but then (d) somehow gives you some
21 flexibility -- for example, you make a mistake but you
22 are in substantial compliance? In other words, I don't
23 even understand how you would get to (d) under the
24 exemption section if you're an interest holder because,
25 looking back at the definition, there is no substantial

1 compliance. It's it or not.

2 COMMISSIONER GIBSON: The reason for (d) --
3 and you're perhaps correct in terms of the strict
4 definition of interest holder. But there is some other
5 language in that definition section relating to
6 interest holder other than one who is in total
7 compliance, I think.

8 But be that as it may, the purpose of it was
9 for the guy who tried but failed to perfect the
10 interest in the proper way not to lose out on a claim
11 for exemption.

12 COMMISSIONER MILLER: Would it be correct to
13 say that, should the motion pass, we really haven't
14 done anything?

15 COMMISSIONER GIBSON: No, I don't believe so.

16 COMMISSIONER MILLARD H. RUUD (Texas): Mr.
17 Chairman.

18 CHAIRMAN LEINENWEBER: I will give you a
19 chance to close, commissioner.

20 On that motion to strike subparagraph (d), in
21 the mid, center aisle here.

22 COMMISSIONER JUSTIN L. VIGDOR (New York): I
23 would simply observe that both in the definition and in
24 subsection (d) it overlooks the reality of the fact
25 that many banking institutions simply do not file, but

1 carry non-filing insurance. They do file liens on
2 automobile or on other conveyances routinely. And we
3 are exposing those interests to forfeiture.

4 CHAIRMAN LEINENWEBER: Commissioner, on the
5 motion. Who wants to speak on the motion? Anybody
6 else?

7 COMMISSIONER BRUCE E. MUNSON (Wisconsin): I
8 am a bit uncomfortable voting on these omissions or
9 deletions on the forfeiture law unless I hear some
10 discussion from the committee on how you view your
11 mandate that you received earlier from the Committee of
12 the Whole to draft these articulable standards for such
13 issues as proportionality.

14 I feel like now we are dealing with these
15 other forfeiture provisions with an unknown factor in
16 the committee's drafting mandate. I would like to have
17 you address that.

18 COMMISSIONER GIBSON: I don't know if what I
19 am going to say will be helpful to you in resolving how
20 you would approach them, but my suggestion would be
21 that you consider that language as overriding all the
22 provisions in the forfeiture section right now, so that
23 in connection with your voting, that you would consider
24 there would always be a judicial review of the
25 forfeitability and that the judge would review it from

1 the point of view of whether the forfeiture was
2 proportionate to the conduct giving rise to the
3 forfeiture action.

4 So, I think if you have that as an overlay, so
5 to speak, of guiding you in connection with these other
6 questions, that you always have that judge who will
7 take a final look at an action. Maybe that will help
8 you.

9 COMMISSIONER MUNSON: I would hope that you
10 could enunciate some examples of how you would avoid
11 some of these horrors that are being paraded before
12 the committee, saying that this could not happen
13 because of our proportionality standards.

14 Thank you.

15 CHAIRMAN LEINENWEBER: Over here, on the
16 motion.

17 COMMISSIONER PETER F. LANGROCK (Vermont): On
18 the motion. As I understand, what you really have here
19 is giving the government a strong-arm clause like the
20 bankruptcy situation. You have an unrecorded mortgage,
21 the government takes over the unrecorded mortgage. In
22 the bankruptcy act, there are policy reasons for this.
23 But why should an innocent interest holder at any time
24 lose property under a forfeiture statute? What is the
25 public policy that says the government deserves this

1 property better than a person who has a legitimate
2 interest but who has just failed to record?

3 COMMISSIONER REID C. PIXLER (Colorado): The
4 way you see it is that deeds won't be recorded or deeds
5 of trust won't be recorded, the property will be
6 seized, forfeiture proceedings commenced, and out of
7 the woodwork comes all these claimants that are related
8 to the person whose property is being seized, claiming
9 unrecorded mortgages.

10 The purpose is, they know they are going to
11 lose the property to the forfeiture. There is
12 absolutely no risk for them to come in and make a
13 fraudulent claim that they did in fact have a mortgage
14 that wasn't recorded and, in essence, try to protect
15 the value of the property through unrecorded mortgages
16 that are absolutely false.

17 COMMISSIONER LANGROCK: You know, I have been
18 trying civil cases a long time, and I always thought
19 those seemed to be ferreted out. We often have that
20 type of situation. Surprisingly enough, the system
21 does work and you can ferret this out.

22 What you are saying is, because of the
23 possibility that somebody will pull a fraudulent
24 conveyance and the government can't prove perjury,
25 can't prove the thing, can't get it before a jury, that

1 we should have an automatic rule, which hurts all the
2 other innocent people -- I think that is silly.

3 COMMISSIONER PIXLER: How is that any
4 different than someone coming to sue that individual
5 for foreclosure action, for a tort collection judgment?
6 In any other respect, if any other party is coming
7 towards that drug dealer who has chosen to hide his
8 wealth in this respect, that other claimant is going to
9 lose.

10 Why should it be any different for the
11 government?

12 CHAIRMAN LEINENWEBER: Commissioner Ruud, to
13 close on the motion.

14 COMMISSIONER MILLARD H. RUUD (Texas): I
15 overlooked the definition of interest holder, and I do
16 want to also include in my motion, if that is
17 appropriate, striking "perfected" in Line 6 on Page
18 104.

19 And my reasons are the same. Commissioner
20 Pixler has raised a question which I think illustrates
21 the reasons for the draconian rule which the committee
22 has drafted, and the reasons are questions of proof.

23 Well, I don't think we need to have such a
24 drastic rule when the government is not in any sense a
25 good faith purchaser or a good faith -- a secured party

1 coming later. And I think we can -- I hope -- in most
2 cases, ferret out the fraud.

3 And therefore, it seems to me the secured
4 party who has a secured interest ought not to lose its
5 interest simply because it hasn't filed, hasn't
6 perfected.

7 I guess that is both a motion and a closer.

8 CHAIRMAN LEINENWEBER: Is there any objection
9 if the gentleman amends his motion to strike the word
10 "perfected" in Line 6, Section 501, subparagraph (2)?
11 His motion will be considered amended. As I
12 understand, that will be consistent with his original
13 motion.

14 Commissioner Yates, on the motion.

15 COMMISSIONER JAMES A. YATES (New York): Mr.
16 Chairman, two observations with regard to some of the
17 previous comments.

18 No. 1, don't lose sight of what the level of
19 proof is here, and that is, the bank in the situation
20 we are talking about or the person who has the
21 unperfected security interest has to come in and
22 prove -- has the burden of proving -- has to come in
23 and prove no knowledge or no reason to know and not
24 being involved in the criminal activity. The only
25 thing we are talking about here is whether or not,

1 because a person failed to perfect, whether or not that
2 person will have a day in court to prove, carrying the
3 burden, prove his innocence and his lack of knowledge
4 and lack of reason to know.

5 The way the language is drafted now, he will
6 never have that day in court, and that is the only
7 issue.

8 No. 2, I think it was the commissioner from
9 Wisconsin had asked the question about whether or not
10 we really have to worry about this provision in light
11 of the disproportionality language that we may write in
12 the future. They are two different issues.

13 Proportionality goes to the issue of lenity. Someone
14 has done wrong; are we punishing too severely or aren't
15 we? This is a separate issue. This is, does the
16 government have a right to property where the person
17 has done no wrong and didn't even know someone else was
18 doing wrong. That is the only issue. It's a question
19 of whether you have a right to seize that property. It
20 has nothing to do with lenity or proportionality.

21 CHAIRMAN LEINENWEBER: The motion is, as I
22 understand it, to strike the word "perfected" in
23 subparagraph (2) of Section 501, which is located at
24 Line 6 on Page 104 --

25 COMMISSIONER MILLARD H. RUUD (Texas): And

1 Line 8.

2 CHAIRMAN LEINENWEBER: And Line 8. Lines 6
3 and 8 on Page 104 and striking in Section 505 all of
4 subparagraph (d).

5 All those in favor of the motion, indicate by
6 saying "aye."

7 All those opposed.

8 The "ayes" have it. The motion carries.

9 Is there further discussion? Commissioner.

10 COMMISSIONER EUGENE A. BURDICK (North Dakota):
11 I assume that the grounds for a forfeiture are
12 substantially the grounds for seizure, except for the
13 exemptions and the proportionality rule.

14 In paragraph (2) on Page 109, in the second
15 line, the sentence reads, "the person whose conduct
16 gave rise to its forfeiture."

17 It hasn't been forfeited yet, has it? Aren't
18 you referring there to seizure? Conduct is essentially
19 the same. I think you are talking about seizure there
20 at that point, rather than forfeiture, because
21 forfeiture hasn't occurred, and you're dealing with
22 creating an exemption to the forfeiture authority.

23 COMMISSIONER DAVID A. GIBSON (Vermont): The
24 property may in fact have been seized, but whether the
25 property has been seized or not, it's still property

1 that is subject to forfeiture under this definition.

2 COMMISSIONER BURDICK: That isn't what it
3 says. It says "which gave rise to a forfeiture," in
4 past tense.

5 COMMISSIONER GIBSON: Sorry. What line are
6 you on?

7 COMMISSIONER BURDICK: Lines 1 and 2. It
8 says, "the person whose conduct gave rise to its
9 forfeiture."

10 COMMISSIONER GIBSON: Conduct would have
11 occurred in the past, but it doesn't mean the property
12 necessarily would have been seized at that point.

13 The "relation back" doctrine indicates that
14 once the conduct has occurred, then, from that point
15 forward, that property is forfeited to the state, even
16 though the state may not find out about it until years
17 later.

18 COMMISSIONER BURDICK: I don't understand that
19 at all, how you talk about property being exempt from
20 forfeiture and then state that it has been forfeited.

21 COMMISSIONER GIBSON: Obviously, you don't get
22 into a question of whether the exemption applies until
23 you have the property actually going through the
24 forfeiture proceedings contemplated under this act. So
25 that in the usual case, the property would have been

1 seized, there would be forfeiture procedures going, and
2 the person would come in and claim the exemption from
3 forfeiture for the reasons stated.

4 But as a hypothetical, that does not have to
5 be the case.

6 COMMISSIONER BURDICK: I don't think you made
7 this very clear, that this is an after-the-fact
8 situation.

9 COMMISSIONER GIBSON: I think it becomes
10 clearer when you look at the remaining sections in this
11 article.

12 CHAIRMAN LEINENWEBER: Mr. President, the
13 Committee of the Whole rises and reports that it has
14 had under consideration the Uniform Controlled
15 Substances Act, has made progress, and asks leave to
16 sit again.

17 ---ooo---

FOURTH SESSION

UNIFORM CONTROLLED SUBSTANCES ACT

SATURDAY, JULY 14, 1990

Harry D. Leinenweber of Illinois, presiding.

CHAIRMAN LEINENWEBER: Commissioner Langbein is recognized for a point of personal privilege -- to make a correction, as I understand.

COMMISSIONER JOHN H. LANGBEIN (Illinois): Thank you. It has been brought to my attention that I misspoke this morning in referring to the Justice Department guidelines from the memorandum of the National Association of Criminal Defense Lawyers.

I had thought that the text on Page 10 of that memorandum was the actual text of the guidelines. It turns out that the text of the guidelines was somewhat reworked there, and the actual text appears at the end of their memorandum.

The substance is substantially the same. It is not, however, completely identical. The language that would be the correlative in the actual Justice Department guideline is language saying that the government's policy is not to seek the fullest forfeiture permissible under the law where that forfeiture would be disproportionate to the defendant's crime.

1 I think that is the same principle, but the
2 language was a little different, and I did not
3 understand at the time I was not reading from the
4 proper text. I apologize to the committee and
5 conference.

6 CHAIRMAN LEINENWEBER: I believe when we
7 broke, Commissioner Mielke was standing, so I am going
8 to call on you first, sir.

9 COMMISSIONER DONALD E. MIELKE (Colorado):
10 Thank you, Mr. Chairman. I have a little
11 non-controversial amendment to clean up the act a
12 little bit, and move to strike section (c) in 505,
13 Lines 4 through 15, Page 110.

14 Shouldn't have any controversy there at all,
15 since that wasn't in last summer's draft, and seemed to
16 be a compromise provision that the committee added in
17 here. I think the committee is not uniform as to this
18 section. This is the only place in law that I know of
19 where the criminal defense attorney's fees are exempt.
20 We don't exempt defense attorney fees in arson cases if
21 the arsonist gets his insurance policy and pays his
22 attorney. We don't exempt him in bank robberies if,
23 upon running out of the bank with the money, he gives
24 it to his attorney. But here we are exempting drug
25 money.

1 So I move to strike it.

2 CHAIRMAN LEINENWEBER: There is a motion to
3 strike Paragraph 505(c). Does the committee wish to
4 respond to the motion?

5 COMMISSIONER DAVID A. GIBSON (Vermont): The
6 work of 505(c) of the committee does represent some
7 recognition of proposals relating to payment of
8 attorney's fees. We have two alternatives that are
9 included here. The committee's position on the
10 inclusion of this is that it should be included. It is
11 true that there were -- the product of compromise
12 positions taken in the committee by various members and
13 lobbyists. And we think that the provisions, at least
14 from the committee's point of view, represent an
15 appropriate compromise solution to this question.

16 CHAIRMAN LEINENWEBER: Is there discussion?

17 COMMISSIONER JAMES A. YATES (New York): Mr.
18 Chairman. If I remember correctly, and I could be
19 wrong, I think there was a vote by the full conference
20 last year and a sense of the House motion that there
21 should be an exemption for attorney's fees. I don't
22 think the draft last year had it. It's true, this is
23 new. But I think it was after a vote by the Committee
24 of the Whole that this was added in, and that is why
25 it's there.

1 CHAIRMAN LEINENWEBER: Is there further
2 discussion on the motion? Commissioner.

3 COMMISSIONER DAVID T. PROSSER, JR.

4 (Wisconsin): The way the language reads now, I am
5 wondering if the legal services that are provided and
6 where the property would be exempt necessarily have to
7 relate to the defense of the criminal charge.

8 It seems to me that the legal services could
9 be involved in the defense of a contract or as a
10 defendant in a divorce suit or all kinds of other
11 things. And I really don't understand how the
12 committee could offer this section to us when it
13 offered Section (b), where completely innocent owners
14 of property, for public policy purposes were going to
15 lose their property. It seems to me that the answer to
16 this is that defense counsel who want to defend drug
17 cases ought to get cash and not take property.

18 CHAIRMAN LEINENWEBER: Further discussion on
19 the motion?

20 Commissioner, on the motion.

21 MR. DAVID D. BIKLEN (Connecticut): In Line
22 10, can you tell me who determines whether the
23 reimbursement was reasonable?

24 COMMISSIONER DAVID A. GIBSON (Vermont): That
25 determination would be subject to the court review.

1 MR. BIKLEN: The court makes that
2 determination?

3 COMMISSIONER GIBSON: That would be my
4 understanding.

5 CHAIRMAN LEINENWEBER: On the motion.

6 COMMISSIONER DAVID PEEPLES (Texas): I support
7 Commissioner Mielke's motion. As I understand Sections
8 511 and 512, even if 505(c) is deleted, there can be a
9 hearing, and if the defendant establishes a need for
10 some of this money to hire an attorney, the court can
11 grant it if there is a probable cause hearing and he is
12 determined to be -- the property is not forfeitable.

13 Now, that is correct, isn't it?

14 COMMISSIONER GIBSON: I believe that is
15 correct.

16 COMMISSIONER PEEPLES: And only if the assets
17 are determined to be forfeitable, traceable to drugs,
18 et cetera, are they not payable to a lawyer?

19 COMMISSIONER GIBSON: That is also correct.

20 COMMISSIONER PEEPLES: If money has been paid
21 to a lawyer and he's got it and earned it, it cannot be
22 recaptured under 511(d).

23 COMMISSIONER GIBSON: I think you're correct
24 in that also.

25 COMMISSIONER PEEPLES: Okay. I would urge

1 that there are adequate protections in the existing
2 provisions even if 505(c) is deleted. And I urge
3 adoption of Commissioner Mielke's motion.

4 CHAIRMAN LEINENWEBER: Further discussion on
5 the -- Commissioner Langrock, on the motion.

6 COMMISSIONER PETER F. LANGROCK (Vermont): Do
7 I understand from the last answer that if money has
8 been paid to an attorney and has been earned by the
9 attorney, that that can't be forfeited?

10 COMMISSIONER GIBSON: That is only under the
11 limited circumstances provided in Section 511.

12 COMMISSIONER LANGROCK: Then the last
13 response, that that can be. I mean, there may be out
14 there in this world some criminal defense lawyers who
15 make a great deal of money from big drug cases. I know
16 that the criminal defense practice that I engage in, I
17 subsidize the justice system by defending people. I
18 end up representing people who don't have money -- the
19 retainers are too small, and they don't pay their way.
20 I never -- end up never collecting it all.

21 The concept that every time I represent a
22 person who has been involved in a charge of selling
23 drugs, that I have to start an inquiry, I have to check
24 each dollar, do the tracing -- I mean, this whole
25 concept is one which is directed not at really

1 forfeiting money, not making the system fall apart,
2 but, really, it's a method of intimidating aggressive
3 defense counsel.

4 It seems to me that this is just another
5 attempt to destroy the relationship, the traditional
6 relationship of an active defense bar. In my
7 practice -- maybe it's Vermont, and maybe it's
8 different down in Florida or some other place -- I
9 think that this provision is a minimal one that should
10 be in, and the idea of striking it, I think, is a
11 mistake, and I think it goes against the sense of the
12 House last year.

13 CHAIRMAN LEINENWEBER: Is there further .
14 discussion on the motion?

15 COMMISSIONER PATRICK C. GUILLOT (Texas): The
16 United States Supreme Court has said that you cannot
17 keep the drug money if it was given to you, so the fact
18 that you may find it personally obnoxious that you have
19 to check and see where the money came from has been
20 tested already.

21 The law that we are proposing here says that
22 if it's been earned by the attorney, as in Section
23 511(d), he or she may keep what has been earned up to
24 that point. There is really absolutely no reason to
25 have Section 505(c), with the safeguards that have been

1 given in 511 and 512.

2 Be that as it may, it's in there as a
3 proposal, but, quite frankly, is somewhat superfluous
4 and redundant when the other safeguards are in the
5 proposed act as they are in 511 and 512.

6 CHAIRMAN LEINENWEBER: Do you wish to speak on
7 the motion?

8 COMMISSIONER ELLEN F. DYKE (District of
9 Columbia): Yes. Let me ask you, when does title to
10 the property change? At what point does title change
11 to forfeited property?

12 COMMISSIONER DAVID A. GIBSON (Vermont): The
13 title to property will change at the time that the
14 conduct giving rise to forfeiture occurred.

15 COMMISSIONER DYKE: So you have a relation
16 back, so you can have a hearing or whatever, a probable
17 cause hearing, but if it's found that the forfeiture is
18 being done with probable cause, then title will have
19 been deemed to have passed sometime in the past -- that
20 is, title to the proceeds, title to the property,
21 whatever it is you're forfeiting here.

22 Consequently, how does even an attorney keep
23 the money that he has gotten from somebody who did not
24 own that money, because the dastardly deed was done and
25 the title to that money has now been transferred to the

1 United States government, in the case of the feds, or
2 to a state government -- and so under what theory does
3 anybody get to keep property that is subject of a
4 forfeiture?

5 COMMISSIONER GIBSON: Under 505(c), that is
6 provided as an exemption from the forfeiture having
7 taken place. So, that if 505(c) is applicable, then
8 the money that has been paid to the attorney remains
9 the attorney's to the extent that he has earned that.

10 COMMISSIONER DYKE: I bring it up because it's
11 a very enormous type of an exception. It's not only
12 that people who have done maybe minimal things wrong
13 that get to lose a lot of property, or maybe innocent
14 spouses get to lose what is theirs, but people who may
15 years later be what they thought were bona fide
16 purchasers of property for which they paid value, to
17 find out, as courts have said on the federal side, that
18 they never acquired title because title was in the
19 United States government as of years before they in
20 fact thought they bought that property. And so this is
21 giving an exception to an attorney who is dealing with
22 the situation and is not -- is just an exception that
23 is not anywhere in the law for any true, bona fide
24 purchasers that are out there.

25 COMMISSIONER GIBSON: If you'll look at

1 505(a), there are some provisions for bona fide or
2 purchasers for value to retain the property even though
3 it may be traceable back to proceeds from drugs, so
4 that it's not the only place where there is an
5 exemption.

6 CHAIRMAN LEINENWEBER: Ready for the question?

7 COMMISSIONER ALLAN G. RODGERS (Massachusetts):
8 Another question about the relationship between 505(c)
9 and 511. I read 511 as being prospective only -- that
10 is, you have a situation in which somebody needs to use
11 money for defense services in the future, and therefore
12 you have a procedure that allows him to come into court
13 and prove what you have to prove in that section and
14 get the release of property to do that.

15 I read 505(c) to allow, and limited
16 exceptions, the payment for attorney's fees for
17 services rendered in the past.

18 Is that an accurate description of those two?

19 COMMISSIONER CURTIS R. REITZ (Pennsylvania):
20 Commissioner Rodgers is correct. 505(c) and 511 have
21 two quite different applications. They don't overlap
22 at all.

23 511 deals with asking a court to release
24 property that has already been seized for the purpose
25 of, in 511(a), defense of the individual. 505 deals

1 with protecting funds already paid to the lawyer prior
2 to any intervention by the government, and it deals
3 with attempts to seize the payments from the lawyer.

4 So, these are two really quite different
5 situations. Whether a lawyer can retain against an
6 effort by the prosecutor to seize the funds in the
7 hands of a lawyer is the issue in 505. Whether a
8 person can get property released from the seized estate
9 in order to pay for a lawyer is the issue in 511.

10 The two do not overlap. And one might be able
11 to infer from 511 that if you can get property back,
12 that somehow you ought to be able to keep it if you
13 already got it before seizure. But that is quite a
14 stretch in a statute of this kind.

15 I think it's important that the conference
16 understand that 505(c) is dealing with retention of
17 funds paid to a lawyer, 511 deals with attempts to get
18 from the estate already-seized money to pay a lawyer,
19 where the lawyer has not been paid yet.

20 CHAIRMAN LEINENWEBER: Any further discussion
21 on the motion?

22 COMMISSIONER ALLAN L. SCHMALENBERGER (North
23 Dakota): I have a question. On 511, is that limited
24 only to when there is a criminal prosecution? If that
25 is only limited to a criminal prosecution, then if you

1 have the civil forfeiture proceedings, then there is no
2 way for that person to get any funds for representation
3 in a civil forfeiture proceeding unless that other
4 provision remains. Is that correct?

5 COMMISSIONER DAVID A. GIBSON (Vermont):
6 You're correct.

7 CHAIRMAN LEINENWEBER: Further discussion on
8 the motion?

9 COMMISSIONER HARVEY S. PERLMAN (Nebraska): I
10 think, if I read these provisions correctly, that this
11 is not the only instance in which drug money might go
12 to a good-faith provider of services or something.

13 Unless I totally misunderstand (b)(2), for
14 example, you could use proceeds of drugs to pay off a
15 loan as long as it was in the ordinary course of
16 business to a loan company. Is that right? All right.
17 So, we don't have a universal rule that we go in and
18 get these funds no matter where they go to or to whom.

19 The thing that is troubling -- I think this is
20 a very troubling issue. This is certainly troubling
21 for me. But the problem here is that you
22 essentially -- it seems to me that the integrity of the
23 criminal justice process is at stake, and that
24 separates lawyers out from other people. I don't think
25 we ought to be frightened to separate ourselves out.

1 The fact of the matter is, the forfeiture
2 provisions give the lawyer for one side power over the
3 lawyer for the other side. And since the prosecutors
4 have discretion under this to decide forfeiture or not,
5 the fact that he can control the funds available to pay
6 the fee of defense counsel brings the integrity of the
7 process into disrepute. It seems to me that the
8 exemption is justified.

9 CHAIRMAN LEINENWEBER: Any further discussion
10 on the motion?

11 COMMISSIONER HAROLD E. READ, JR.
12 (Connecticut): Can you tell me what is the
13 significance in Line 4 of property acquired in good
14 faith by a lawyer in payment for his services?

15 Can a lawyer acquire property in bad faith in
16 performance for legal services, as compensation for
17 legal services that he performs? What are we talking
18 about?

19 COMMISSIONER DAVID A. GIBSON (Vermont): We
20 are talking about making sure that the lawyer is not
21 engaged in any sham or fraudulent receipt of excess
22 funds or assets, and that is what the good-faith
23 requirement connotes, is that this is done by a lawyer
24 even though he may have some knowledge that the person
25 is a drug dealer and the money may have come from

1 drugs. But it's to make sure that we are not
2 encouraging lawyers to act in bad faith, which would be
3 the equivalent of overcharging or taking a large
4 retainer when they know they're going to plead the guy
5 guilty the next day or something like that.

6 CHAIRMAN LEINENWEBER: Anything further on the
7 motion? Yes.

8 COMMISSIONER ELLEN F. DYKE (District of
9 Columbia): I think the only reason why this must be in
10 there is just so we are not subverting the criminal
11 justice system and that even supposed drug dealers can
12 get defense.

13 . But the fact is that the exemptions you point
14 out are exemption for owners, and, of course, interest
15 holders. But the owner is what is interesting to me,
16 because it is important to note that any future
17 possessor of this property may not be defined as an
18 owner, because title has already transferred. And so
19 you cannot point to these sections as exemptions for
20 anybody else but the person who is in fact an owner.

21 If the courts have told you that you cannot
22 own something that has not been transferred to you
23 because they did not have title anymore, these
24 exemptions don't apply. And so we have to look at the
25 one for lawyers as being one that merely upholds our

1 system of justice. But there is nothing else in this
2 statute, I think, that comes even close to allowing
3 proceeds to go to somebody after the forfeiture has
4 already changed title to the government.

5 CHAIRMAN LEINENWEBER: All right. The motion
6 is to strike subparagraph (c) of paragraph 505.

7 All those in favor, signify by saying "aye."

8 All those opposed.

9 The "noes" have it. The motion fails.

10 Commissioner Hogan.

11 COMMISSIONER WILLIAM E. HOGAN (New York): I'd
12 like to raise a question about 505(a)(1), Lines 11 and
13 12.

14 As I understand this provision, it is not as
15 protective of third parties as the federal law would
16 be, in that we have reason to know, and the federal law
17 has some language about blindness or something
18 suggesting reckless disregard of the facts.

19 If that is correct, I would move that we
20 conform this provision to the federal standard.

21 CHAIRMAN LEINENWEBER: Mr. Harbin.

22 MR. HARRY HARBIN: Federal law, there is a
23 willful blindness language in the statutory innocent
24 owner defense that applies only to conveyances.

25 Legislative history makes very clear that

1 willful blindness means reason to know. I believe this
2 language is consistent, in fact, with federal law.

3 COMMISSIONER HOGAN: Well, if it means -- in
4 the legislative history, if it says "willful blindness
5 means reason to know," that is a tremendous torturing
6 of the language.

7 CHAIRMAN LEINENWEBER: All right. The motion
8 is --

9 COMMISSIONER HOGAN: I have the language now,
10 Mr. Chairman.

11 CHAIRMAN LEINENWEBER: Would you repeat your
12 motion.

13 COMMISSIONER HOGAN: That the language be
14 changed to establish a test that the act be without
15 knowledge, consent, or willful blindness of the owner
16 or interest holder.

17 CHAIRMAN LEINENWEBER: All right.
18 The motion is that subparagraph (1) of paragraph (a) of
19 Section 505 be amended to establish a test, that the
20 test, that the act be without knowledge, consent, or
21 willful blindness.

22 Is that correct?

23 COMMISSIONER HOGAN: That is correct.

24 CHAIRMAN LEINENWEBER: Is there discussion on
25 the motion? For the committee? Anything further from

1 the committee on that?

2 COMMISSIONER RICHARD L. BRAUN (North
3 Carolina): Question. Why do we need consent for that
4 purpose? I don't understand that. Consent from whom?

5 COMMISSIONER HOGAN: I suppose, as a contracts
6 teacher, I would make a distinction between knowing
7 something and consenting to it. If you were a
8 participant in it, I suppose you might have consented
9 to it.

10 I am not wedded to the language. I just
11 thought it would be sensible to have the same standard
12 that is in the federal rule.

13 COMMISSIONER REID C. PIXLER (Colorado): The
14 practical aspect of this is that people will come in,
15 as they do in the federal statute -- I think it's
16 881(a)(4). And there have been cases where they're
17 saying: Yes, I had knowledge of the drug dealing and I
18 didn't consent to it, didn't do anything.

19 And your language talking about consent, they
20 did not consent, is going to create a whole battery of
21 arguments and litigation over what they did with their
22 vehicle.

23 The point of limiting it to knowledge, reason
24 to know, willful blindness, is to limit the attention
25 that can be drawn to the car. And if this individual

1 has knowledge that drug trafficking is being used,
2 consent or lack of consent is not a defense to it
3 because they're involved in it.

4 COMMISSIONER HOGAN: I am being nailed for
5 something I didn't invent. Is consent in the federal
6 statute or not? Is consent in the federal standard or
7 not?

8 COMMISSIONER PIXLER: I believe it's only in
9 one small section.

10 COMMISSIONER HOGAN: Well, it's in one small
11 section.

12 COMMISSIONER DAVID A. GIBSON (Vermont):
13 Sorry. I think the committee deliberately chose this
14 language. We did look at the willful blindness. We
15 thought our product was superior to the federal
16 language.

17 COMMISSIONER HOGAN: Because it's more
18 restrictive on transferees.

19 COMMISSIONER JAMES A. YATES (New York): Mr.
20 Chairman. I do believe that the language that you have
21 there does conform, as I understand it, to a 1988
22 amendment to the Federal Drug Act, and that was put in
23 place after the zero tolerance, the history with zero
24 tolerance that we had the year or two before that.
25 Mostly it was to try and do away with the extreme cases

1 you had that follow off the line of Calero-Toledo
2 versus Pearson Yacht Leasing, which is an extreme case
3 of the zero tolerance approach. That is where you had
4 a leasing company lease a yacht and there was one crew
5 member, I think, had a cigarette, marijuana cigarette,
6 so the yacht leasing company lost the yacht.

7 This is language that Congress put in to try
8 and cure that situation. And apparently -- I think
9 it's worked pretty well.

10 One thing you have to remember, if you just
11 work on the knowledge standard alone -- we have a name
12 for people who know about a crime. It's called a
13 witness. I mean, there are people who don't want
14 criminal activity to occur, don't participate in it,
15 but they know about it. They're witnesses.

16 Now, we are told, I think, in the commentary
17 here, that duress would be a defense. I think the
18 beneficial aspect of the amendment that you're offering
19 is three-fold. No. 1, not only are you conforming to
20 federal law, not only are you saying something about
21 the zero tolerance approach for innocent people, but,
22 third, you're making it clear that in the duress
23 situation, where you have somebody who is a criminal
24 and you have a witness who is afraid to do anything
25 about it but knows about it, that person is a victim or

1 witness, not a criminal, and we take shouldn't treat
2 him or her as though he is a criminal.

3 CHAIRMAN LEINENWEBER: Further discussion on
4 the motion.

5 MR. HARRY HARBIN: Mr. Chairman, may I be
6 heard once more? The defense that includes willful
7 blindness in federal law applies only to conveyances.
8 It doesn't apply across the board. If we should have
9 this, perhaps it should be limited to conveyances.

10 CHAIRMAN LEINENWEBER: On the motion.

11 COMMISSIONER PETER F. LANGROCK (Vermont): I
12 am going to speak on behalf of the bank, maybe the
13 first time in my entire career.

14 [Laughter and applause]

15 COMMISSIONER LANGROCK: Somebody stuffed in my
16 box last night a letter from the First Interstate Bank
17 in Los Angeles, California. This is part of the
18 paragraph. "I will recount the actual experience of
19 Security Pacific National Bank losing on a ruling that
20 they should have known from newspaper stories of
21 investigations against its customer that the customer
22 was engaged in proscribed conduct, and, because of
23 that, should not have continued funding the loan."

24 I mean, I don't know whether this is true or
25 not, but it's a piece of paper. When you talk about

1 "should have known," that is an entirely different
2 standard than willful blindness. This is the language
3 of the federal code. I mean, I don't know why -- are
4 we saying here that the federal forfeiture laws aren't
5 stiff enough, that they don't give enough room, and
6 we've got to give more room to prosecutors?

7 I mean, I would like to go a whole lot
8 further, but at least give the protection here that
9 would protect a bank.

10 CHAIRMAN LEINENWEBER: Anything further on
11 this motion? Ready for the question?

12 The motion is, as I understand it, that
13 Section 505(a)(1) be amended to change the test from
14 knowledge or -- to know or have knowledge, have reason
15 to know, to one of knowledge, consent, or willful
16 blindness.

17 Did I state the motion correctly?

18 COMMISSIONER WILLIAM E. HOGAN (New York):
19 Correct.

20 CHAIRMAN LEINENWEBER: All those in favor, say
21 "aye."

22 All those opposed.

23 The "ayes" have it. The motion carries.

24 Further discussion on Section 505.

25 Commissioner.

1 COMMISSIONER JAMES C. MCKAY, JR. (District of
2 Columbia): I have a question with regard to 505(a)(2).
3 It seems there -- and I gave a note to the chairman --
4 that somebody who owns property jointly with another,
5 in that situation the property could not be forfeited
6 because the person, even though A engaged, used it to
7 manufacture drugs and B fully knew about it but didn't
8 benefit, then the way you have written (a)(2), that
9 property could not be subject because A alone would not
10 be authorized to convey it.

11 I am wondering whether or not that is an
12 oversight or what.

13 CHAIRMAN LEINENWEBER: Who wishes to discuss
14 that at the committee?

15 COMMISSIONER PATRICK C. GUILLOT (Texas): I am
16 not sure I understand the question. Are you referring
17 to Section 505?

18 COMMISSIONER MCKAY: It's (a)(2) on 109, which
19 is independent --

20 COMMISSIONER GUILLOT: There is a question on
21 whether that is in the right section and whether the
22 word "not" should be there. We are divided,
23 apparently, on the committee as to whether it's in the
24 right section and whether the word "not" should be
25 there. So, I don't know if we can answer your

1 question.

2 COMMISSIONER McKAY: It seems that you ought
3 to make that clear because there is a substantive --

4 COMMISSIONER GUILLOT: I agree with you.

5 COMMISSIONER McKAY: All right. But we ought
6 to have that clear and have an opportunity to amend it
7 if it's made clear and . . .

8 COMMISSIONER GUILLOT: It possibly should be a
9 (b)(5), which would read: The person whose conduct
10 gave rise to its forfeiture did have the authority to
11 convey.

12 It would then be under the section saying
13 property is not exempt from forfeiture under this
14 article even if the owner or interest holder lacked
15 knowledge or reason to know that the conduct making the
16 property subject to forfeiture was likely to occur, if
17 the person whose conduct gave rise to its forfeiture
18 did have the authority to convey the property of the
19 person claiming the exemption to a good faith purchaser
20 for value in the ordinary course of business.

21 COMMISSIONER McKAY: Well, you understand the
22 problem.

23 COMMISSIONER DAVID A. GIBSON (Vermont): The
24 only other thing I would add is that in that situation
25 where you have joint ownership of property and one of

1 the joint owners does something, the interest of that
2 joint owner could be forfeited and the interest of the
3 innocent owner would remain in the innocent owner's
4 hands. So, all of a sudden, you may have the state or
5 federal government as a partner instead of somebody
6 else.

7 COMMISSIONER ALLAN G. RODGERS (Massachusetts):

8 Could the committee explain what (b)(4) means? The
9 introductory phrase to (b) says that the property is
10 not exempt even though the owner or interest holder
11 lacked knowledge or reason to know.

12 Then (4) says the owner, interest holder is
13 criminally responsible for the conduct giving rise to
14 the forfeiture.

15 I wonder if you could explain what kind of
16 example would fit both of those situations.

17 COMMISSIONER GIBSON: The committee is drawing
18 a blank at the moment. If you'll defer for us, maybe
19 somebody will come up with a response.

20 COMMISSIONER FRED H. MILLER (Oklahoma): That
21 was a question I had, too. There was a recent
22 newspaper story in one of the Oklahoma papers, and let
23 me give you a fact situation and see if this is what
24 you had in mind.

25 "Although charges were eventually dropped

1 against a former Tulsa man, he was forced to forfeit an
2 airport, motorhome, and \$37,200 in cash seized by the
3 IRS. The assets were seized pursuant to the Anti-Drug
4 Abuse Act of 1986. A federal magistrate determined
5 there was no probable cause that the person had
6 committed the crime and dismissed all charges against
7 him. Under federal law, the government is allowed to
8 seize a person's assets and distribute them even if the
9 accused is acquitted or the charges are eventually
10 dropped."

11 The way I read (b)(4), that would be the same
12 result under our proposed statute. Is that a correct
13 interpretation?

14 COMMISSIONER GIBSON: I am not sure that it
15 is.

16 COMMISSIONER MILLER: I would hope that it
17 would not be. I guess I am at somewhat of a loss if I
18 can't get an answer from the committee. I think there
19 is good and sufficient reason for some version of
20 (b)(4), because I don't know that we want to wait on
21 forfeiture in all cases until there is a conviction or
22 something of this nature.

23 But, by the same token, if the charges are
24 dropped or if the person is acquitted, it seems to me
25 we didn't want to forfeit the property -- or at least I

1 don't see an immediate reason why.

2 COMMISSIONER JAMES A. YATES (New York): Mr.
3 Chairman. There may have been a little hesitation to
4 answer up here, but the answer is crystal clear. It's
5 not ambiguous. It is very clear that an acquittal or
6 dismissal does not preclude civil forfeiture under this
7 act.

8 If you look at Page 132, Lines 1 through 3,
9 the committee says so in black and white right there.

10 COMMISSIONER MILLER: Having now received
11 appropriate instruction from the committee, could I
12 also receive some indication as to why this should be
13 true?

14 COMMISSIONER REID C. PIXLER (Colorado): I
15 would like to try to address your question. I don't
16 have any particular facts or knowledge of the facts
17 that you recited.

18 The history of forfeiture actions that are in
19 rem, civil actions, are traditionally that they're not
20 part of the criminal procedure and they're not
21 dependent upon it. There are a number of reasons for
22 that, many of which include the admissibility of
23 evidence that would be admissible in a civil case that
24 may not be admissible in a criminal case, and the fact
25 that there are substantially different burdens of proof.

1 in those cases.

2 We don't have any information from what you
3 read concerning what had happened, what involvement
4 that the individual had had to cause his property to be
5 forfeited. But there are any number of things that
6 could happen to a criminal case -- unavailability of a
7 witness that previously testified at a civil proceeding
8 or had given a deposition, either by death or flight --
9 any number of things that can cause the inability of
10 the evidence to go forward that is not related to the
11 acts that led to the forfeiture of the property.

12 Therefore, they're not really related. This
13 specific section, I think, is very clearly the law as
14 it exists, that the civil forfeiture is not dependent
15 upon the obtaining of a criminal conviction. As we all
16 know, at different trials in criminal actions, there
17 are a number of reasons that that individual may be
18 acquitted, including suppression of evidence, which,
19 again, in terms of the ability to prosecute the
20 criminal case, suppression of key evidence may cause
21 the case to be dismissed at the election of the
22 prosecutor. That same evidence, or other evidence that
23 was obtained that was not tainted by the seized
24 evidence, may be admissible in the civil suit.

25 So, they are not related, and the acquittal or

1 dismissal of a criminal charge should not control the
2 eventual disposition of the civil suit.

3 COMMISSIONER MILLER: With all deference,
4 since I am simply a simple commercial lawyer, while
5 that seems persuasive, when I turn to the statute, it
6 says, "is criminally responsible." If it doesn't mean
7 criminally responsible in the sense that we are talking
8 about, subject to getting a conviction, for example,
9 what does "criminally responsible" mean and who
10 determines it?

11 COMMISSIONER JAMES A. YATES (New York): Mr.
12 Chairman, if I may. I think it's a question of burdens
13 of proof. If you're convicted of a crime, you're
14 convicted by proof beyond a reasonable doubt. Here
15 you're talking about a determination where the
16 defendant would prove the negative, and that is, would
17 prove by a preponderance of the evidence that he is not
18 criminally responsible for the offense.

19 CHAIRMAN LEINENWEBER: Further discussion.

20 COMMISSIONER JUSTIN L. VIGDOR (New York): I
21 share Commissioner Miller's concern, but I have even a
22 further concern. Because it would seem to me that the
23 issue of acquittal is irrelevant even where a third
24 party is concerned, not only the defendant himself.

25 Am I correct about that, that a third party's

1 property would be subject to forfeiture despite the
2 fact of the acquittal of the alleged perpetrator?

3 COMMISSIONER PIXLER: If he knew or consented
4 to the use or any of the other things --

5 COMMISSIONER VIGDOR: If he knew or had reason
6 to know, as it now reads.

7 COMMISSIONER PIXLER: Or any of the other
8 actions that give rise to any of the other conduct that
9 gives rise to forfeiture, which would include any of
10 the criminal responsibility for maintaining or
11 controlling the property. The example --

12 COMMISSIONER VIGDOR: Seems unthinkable, but
13 that is the way you wrote it.

14 CHAIRMAN LEINENWEBER: Further discussion on
15 Section 505?

16 COMMISSIONER ALLAN G. RODGERS (Massachusetts):
17 The other inconsistency which I can't puzzle through is
18 that the introductory phrase says, "even though the
19 owner, interest holder lacked knowledge or reason."
20 And then (4) says, "the owner, interest holder is
21 criminally responsible."

22 How can those two things exist together?

23 COMMISSIONER DAVID A. GIBSON (Vermont): The
24 discussion apparently has not triggered any
25 recollection. It may well be that (4) should come out,

1 but . . .

2 COMMISSIONER CURTIS R. REITZ (Pennsylvania):
3 Mr. Chairman, I think I can be helpful. As I recall
4 the drafting committee's discussion of this, what you
5 have is simply a style problem, not a substance
6 problem.

7 The content of Paragraph (4) I think should be
8 a freestanding paragraph that starts with a letter, not
9 a number, that under no circumstances can any of the
10 exemptions run in favor of someone who is criminally
11 responsible for the conduct.

12 The way it's positioned gives rise to the
13 obvious point that Allan and others have made. That
14 has an exception to an exception. Given the
15 introduction to paragraph (b), (b)(4) looks very
16 foolish. But if you take (b)(4) and make it a
17 freestanding subsection (c) and state clearly what I
18 think is the intent of the Drafting Committee: That
19 the person who is criminally responsible for the
20 conduct, if the prosecution can show that, and show
21 that under civil standards, should not get the benefit
22 of any exemption.

23 CHAIRMAN LEINENWEBER: Yes, commissioner.

24 MR. GRAHAM D. WALKER (Nova Scotia): Mr.
25 Chairman, I'd like to go back to a question that was

1 raised on this section by the commissioner from the
2 District of Columbia. 514(e) on Page 131 says, "all
3 property declared forfeited under this article vests in
4 the state as of the time of the commission of the
5 conduct giving rise to the forfeiture."

6 In terms of real property lawyers, how can we
7 talk of owners and interest holders if there is no
8 ownership or interest to be conveyed or brought
9 forward?

10 If my title disappears from the time of the
11 commission of the offense, which is the matter that
12 gives rise to the subject of forfeiture, what
13 difference does it make whether I have knowledge,
14 whether I made any effort to find out? How can I have
15 an interest?

16 I wonder if perhaps the exemptions really
17 aren't exemptions at all, or if they are intended to be
18 exemptions. The language of real property law may be
19 getting in our way. I wonder if someone on the panel
20 has a comment on that.

21 COMMISSIONER DAVID A. GIBSON (Vermont): I
22 will try. By providing that property is exempt from
23 forfeiture, you eliminate the fact that the title has
24 gone to somebody else. Because, in fact, the time that
25 you determine that title vested some time ago by reason

1 of the conduct is not determined until you get into a
2 situation where you have arrest and seizure and so
3 forth.

4 So that, by saying that this is exempt from
5 forfeiture, you therefore don't mess with the title to
6 the property that otherwise would exist. And it is for
7 that reason that we -- I think maybe we are getting a
8 little bit mixed up by applying the fiction of the
9 legal "relation back" doctrine -- which, after all, is
10 a fiction -- and which justifies, in some people's
11 minds, the forfeiture applying to the whole interest,
12 but recognizing that others may in fact have got
13 legitimate interests in the property somewhere along
14 the way. We don't want to affect those legitimate
15 interests, and that is why we say they're exempt from
16 forfeiture.

17 CHAIRMAN LEINENWEBER: Commissioner.

18 COMMISSIONER MICHAEL D. HAWKINS (Arizona):
19 Just a quick question and then perhaps a motion,
20 depending on the answer from the committee. Did the
21 committee with 505(c) on Page 110 wish the Committee of
22 the Whole to comment on which alternative was
23 preferred, or was it the committee's wish that this
24 would go out eventually to the states, with the states
25 being able to choose between the two alternatives?

1 COMMISSIONER GIBSON: It was the latter
2 suggestion, that the states can choose.

3 COMMISSIONER HAWKINS: Then I don't have a
4 motion.

5 CHAIRMAN LEINENWEBER: Commissioner on the
6 right.

7 COMMISSIONER FRED H. MILLER (Oklahoma): In
8 subsection (c) at the end of Alternative 2, it stated
9 that the state has the burden of producing evidence of
10 actual knowledge.

11 The committee at an earlier time responded
12 that in terms of subsection (a), the burden is on the
13 owner or interest holder.

14 Would you enlighten me as to the difference,
15 why there is the difference.

16 COMMISSIONER GIBSON: I can only state that
17 the committee felt this language was appropriate in
18 connection with the way that 505(c) was drafted. That
19 particular sentence applies only to Alternative 2,
20 which uses the phrase "actual knowledge." So it's
21 limited to that one particular section. It was felt
22 that it would be very difficult for an attorney, or
23 whomever, to prove the negative. We would rather put
24 the burden of proving the positive on the person who is
25 asserting it.

1 COMMISSIONER JAMES A. YATES (New York): Mr.
2 Chairman, if I may. I think that that language was put
3 in at the specific request of the liaison for the ABA,
4 who was at the committee meetings but isn't here right
5 now.

6 I think the concern was that if the attorney
7 has the burden of proof, the attorney is only going to
8 do that by using privileged information, that if you
9 leave the burden on the state, then the state will go
10 ahead and prove actual knowledge by information which
11 is extrinsic to privileged communications. And in
12 order not to force a mini-trial which revolves around
13 privileged communications, the ABA had a strong
14 preference, I think, or at least the representative,
15 the liaison, did, that we use this language.

16 COMMISSIONER MILLER: It strikes me that is a
17 very tenable explanation, but also another explanation
18 might be that it seems a fairer allocation of the
19 burden of proof as opposed to subsection (a).

20 I guess I would like to move that in reference
21 to this section, where there is a question of the
22 knowledge of the owner or the interest holder, that the
23 burden of proving knowledge is on the state.

24 CHAIRMAN LEINENWEBER: What section is that?

25 COMMISSIONER MILLER: It would be the entire

1 section, Mr. Chairman. It appears both in terms of
2 (a), which relates to the exemption, and (b), in terms,
3 I think, of certain preclusions from the exemption.

4 CHAIRMAN LEINENWEBER: All right. The motion
5 is, as I understand it, that Section 505 be amended in
6 both subsections (a) and (b), to provide that the
7 burden of proof in all instances be on the state.

8 Is that correct?

9 COMMISSIONER MILLER: That is correct.

10 CHAIRMAN LEINENWEBER: Does the committee wish
11 to comment on that motion?

12 COMMISSIONER GIBSON: The committee is opposed
13 to this motion. The forfeiture provisions, as the
14 conference well knows, have been the subject of many
15 meetings and discussions and determinations as to where
16 burdens should go as well as other matters and issues.

17 We debated it at length. We came up with our
18 position as expressed in the act, and the committee
19 feels that the motion should be defeated.

20 CHAIRMAN LEINENWEBER: Further debate on the
21 motion. Anybody on the motion? If not, ready for the
22 question.

23 The question is, should Paragraph 505(a) and
24 (b) be amended to provide that the burden of proof be
25 on the state?

1 All those in favor, signify by voting "aye."

2 All those opposed, "nay."

3 The "ayes" have it.

4 Further discussion on the section.

5 Commissioner Hogan.

6 COMMISSIONER WILLIAM E. HOGAN (New York): I
7 would like to direct the House's attention to
8 subsection (2) of subsection (b), which provides that
9 even if the transferee of the property is without
10 knowledge of the conduct that may result in the
11 forfeiture, that they will nonetheless be subject to
12 the forfeiture if they received a benefit out of the
13 ordinary course of business:

14 I don't understand why someone who satisfies
15 (a), as we have now amended it, should be subjected to
16 this question as to whether it's in or out of the
17 ordinary course of business.

18 They are by hypothesis an innocent, and we are
19 now going to subject the loan company to an argument
20 that if they took an early payment, that was out of
21 their ordinary course of business, and thus they're in
22 (b). I move to strike (b)(2).

23 CHAIRMAN LEINENWEBER: There is a motion to
24 strike subparagraph (b)(2), correct?

25 COMMISSIONER HOGAN: Correct.

1 CHAIRMAN LEINENWEBER: Of Section 505.

2 For the committee?

3 COMMISSIONER GIBSON: I don't believe the
4 example that you cited, commissioner, would be the one
5 that would fail on account of No. 2, because I think
6 early payments are traditionally accepted as being in
7 the ordinary course of business.

8 What this provision is designed to get at is
9 the situation where somebody may make a considerable
10 amount of money on drugs, go out, buy a diamond ring,
11 give it to their fiance or their mother, or whatever,
12 and then, lo and behold, it's determined that the
13 source of the money for the ring was illegally derived
14 from drug transactions, that the recipient really
15 didn't pay any consideration for it, and why should
16 that ring not be forfeitable.

17 COMMISSIONER HOGAN: I have no answer to that,
18 but your statute does more than that. That is another
19 example of your responding with a hypothetical that is
20 inside your language, when a whole lot of other things
21 are brought into your more general language.

22 If you want to tell me that subsection (2)
23 applies to transfers without consideration, I will sit
24 down. And if it can be amended to that effect, I will
25 sit down. But you've got it applying to every

1 transaction which is not in the ordinary course. That
2 doesn't include simply questions of no consideration.

3 COMMISSIONER GIBSON: The only other thing I
4 would add, commissioner, is to bear in mind that by
5 earlier action, if there is overreaching, then the
6 judge can say so.

7 CHAIRMAN LEINENWEBER: Any further discussion
8 on this particular motion?

9 COMMISSIONER HAROLD E. READ, JR.
10 (Connecticut): Yes, sir. When the committee says that
11 the drug dealer buys a diamond ring and gives it to his
12 girlfriend, this is not the ordinary concept of a
13 transaction in or out of the ordinary course of
14 business -- depending on her business, but --

15 [Laughter]

16 COMMISSIONER READ: And you say that
17 prepayment is in the ordinary course of business. Now,
18 the ordinary course of business is a business concept.
19 Could you describe to me a business transaction which
20 you think would be subject to this because the payment
21 was out of the ordinary course of business?

22 COMMISSIONER GIBSON: Commissioner, as far as
23 we can tell, if it is a legitimate business
24 transaction, then I would say that any benefit
25 received, as described, would be in the ordinary course

1 of business.

2 It seems to me that if I owe you money but
3 it's not due for six months from now, but I decide I
4 want to pay it five months early, that is something
5 that occurs regularly in the ordinary course of
6 business.

7 COMMISSIONER READ: With all due respect to
8 the committee, I would submit that if you look in the
9 field of commercial law at the cases dealing with
10 transactions which are or are not in the ordinary
11 course of business, you would find that a prepayment
12 may very well be outside of the ordinary course of
13 business, and so would most of the other things that
14 you're likely to think of.

15 A variance of the terms of a transaction,
16 whether it's prepayment, modification of payment, or
17 anything like that, is likely to be out of the ordinary
18 course of business. A transfer of -- a sale of a
19 vehicle, for example, if not by a dealer, is likely to
20 be an out-of-the-ordinary course of business. You're
21 dealing with a whole area of the law that you don't
22 have any definitions or guidelines to help with. I
23 think this concept is terrible. I support the motion.

24 CHAIRMAN LEINENWEBER: Any further discussion
25 on the motion?

1 COMMISSIONER HARVEY S. PERLMAN (Nebraska): I
2 believe that (b)(2) also covers personal transactions,
3 and if it's hard to apply ordinary course of business
4 to commercial enterprises, I would find it even more
5 difficult in personal transactions.

6 I take it that if we already concerned
7 ourselves in (b)(1) with family jointly-owned cars, in
8 (b)(2) I assume if a father lends money to a child to
9 buy a car and then is paid back unknowingly by the
10 proceeds from drugs, that they fit under (b)(2) because
11 there is no business for it to be in or out of the
12 ordinary course of.

13 I don't know why it's limited to
14 proportionate. I assume if you get disproportionate
15 benefits which would -- then somehow you're not within
16 the exemption.

17 This section makes no sense.

18 CHAIRMAN LEINENWEBER: Any further discussion
19 on this motion?

20 COMMISSIONER LLOYD S. KURTZ, JR. (Alaska):
21 Those of us who have practiced a lot of bankruptcy law,
22 particularly in some of the states where oil price
23 drops have hit us pretty hard the last few years, know
24 that there is a great body of bankruptcy law on what is
25 and is not in the ordinary course of business.

1 And leaving aside the general commercial law
2 that's also been mentioned, there is a real danger that
3 that entire body of bankruptcy law might be applied to
4 this section, which would result in perhaps a person
5 who innocently collected an account receivable having
6 to give it back because it wasn't in the ordinary
7 course of business under the bankruptcy code.

8 CHAIRMAN LEINENWEBER: Further discussion on
9 the motion? The gentleman may close on his motion.
10 Proceed.

11 COMMISSIONER WILLIAM E. HOGAN (New York):
12 Commissioner Auerbach pointed out to me, we have a
13 statute which deals with transactions outside the
14 ordinary course of business. They are called bulk
15 transfers, and they happen regularly. There is nothing
16 the matter with them except for the fact that creditors
17 ought to be protected. And we approve them so long as
18 creditors are protected.

19 I return to my notion that if you're innocent
20 by the statute, statute standards, you should not be
21 dragged in under this very amorphous, unrelated
22 standard of ordinary course of business.

23 CHAIRMAN LEINENWEBER: The motion is to strike
24 paragraph (b)(2), or subparagraph (b)(2) of Paragraph
25 505.

1 All those in favor, signify by saying "aye."

2 All those opposed, "no."

3 The "ayes" have it. Motion is carried.

4 Further discussion on this? Commissioner

5 Hill.

6 COMMISSIONER M. KING HILL, JR. (Maryland):

7 Mr. Chairman, before we leave this section, I am not at
8 all clear where we stand on sub (4) at the top of Page
9 110.

10 We seem to have abandoned debate when
11 Commissioner Reitz made a suggestion that it should be
12 stricken and rewritten as a separate section and then
13 considered by the conference.

14 I have no commitment from the Drafting
15 Committee that they have accepted Commissioner Reitz's
16 suggestion. Is there an acceptance of that suggestion
17 or not?

18 CHAIRMAN LEINENWEBER: Apparently there is.

19 MR. GRAHAM D. WALKER (Nova Scotia): Mr.
20 Chairman, to follow up on my previous question. I am
21 not arguing that there shouldn't be forfeitures. I am
22 not arguing that there shouldn't be exemptions. I
23 recognize that the definition of interest holder is a
24 term of art.

25 However, unless you give the word "owner" the

1 broadest possible interpretation, then there is no
2 title to be passed. How does the person fit within the
3 category of saying to the court, "That is mine, you
4 shouldn't take it"?

5 If we are talking about the person who has
6 possession, is there anything wrong with adding "person
7 in possession" here, and then it's very clear. Because
8 the person 15 years down the road will find that they
9 don't have a title. And I know it's a legal fiction in
10 514(e), but Lord Ha Ha was hanged by the British under
11 the legal fiction that a person who held an Irish
12 passport was a British citizen. So, you know, legal
13 fictions are things that have real effect in law.

14 I raise that with the panel to consider that
15 as a suggestion.

16 CHAIRMAN LEINENWEBER: Commissioner.

17 COMMISSIONER BERNARD HELLRING (New Jersey): I
18 inquire from the committee if you would be willing to
19 change the last word on Page 108 from "or" to "and" --
20 that is at the end of Section 505(a)(1)(ii).

21 If you did make the change, I think it would
22 prevent the exemption contained in 505(a)(2) from
23 swallowing the requirement of 505(a)(1).

24 What is the view of the committee? And may I
25 ask for an explanation of what that view is.

1 COMMISSIONER DAVID A. GIBSON (Vermont):

2 Commissioner, this question has been brought to my
3 attention and I think to some of the other members of
4 the committee, and was brought out very recently. We
5 just haven't had a chance to look at it.

6 This language was put together in connection
7 with a reworking of this whole exemption section at the
8 last formal meeting of the committee. And it was clear
9 from that language that we worked with and the draft --
10 that the author of the draft had it as "or" and not as
11 "and," so I am reluctant to say here that there would
12 be any definite change to it.

13 All I can say is that the committee is willing
14 and obviously will be looking at the section again in
15 view of the considerable action that has been taken
16 regarding it by the conference today.

17 COMMISSIONER HELLRING: In view of that
18 comment, I won't make any motion and will hope that the
19 committee will favor the change that I have suggested
20 by the question which I have asked.

21 COMMISSIONER ROGER C. HENDERSON (Arizona): I
22 lost track of where we are. But I have a question.
23 With the passage of Commissioner Hogan's proposal, is
24 it still the case under the act, now that you have
25 deleted 505(b)(2), that where you have a recipient who

1 knows that these are illicit proceeds or pays no
2 consideration for them, that that can be forfeited?

3 It seems to me that we at least ought to treat
4 these people like we would treat them under the
5 Fraudulent Transfers Act, so if you know you're getting
6 illicit proceeds or you haven't paid valuable
7 consideration even though you don't know, that somehow
8 or other you ought not to be able to keep it.

9 So, I hope Commissioner Hogan's motion would
10 not preclude what he would have agreed to have done had
11 you given him the right answer, at least the answer
12 that he said -- if you're talking about merely lack of
13 consideration, he'd sit down.

14 I would hope you'd consider that and make sure
15 that is still in there.

16 COMMISSIONER DAVID A. GIBSON (Vermont): I
17 think -- but obviously we will have to take a close
18 look at it -- I think that in the situation you pose,
19 the property would be forfeitable still.

20 CHAIRMAN LEINENWEBER: Commissioner.

21 COMMISSIONER MARLIN J. APPELWICK (Washington):
22 Thank you, Mr. Chair. In 505(c), at Line 10 on 110,
23 the committee has used terms "reasonable" and "earned."

24 And I would move that the word "earned" be
25 replaced with "received."

1 It occurs to me that if someone has paid a
2 retainer for their defense, under some state laws that
3 retainer is earned as a matter of contract law when a
4 contract is signed and representation undertaken. In
5 other cases that is not the case, and it is earned
6 ratively.

7 The same would be true where there has been a
8 retainer paid and a fee advance deposited. Your
9 language "earned" would make the advance forfeitable
10 whether or not it was paid or received by the attorney
11 prior to receiving knowledge.

12 The function of the word "earned" would also
13 appear to allow the interruption of representation. So
14 that monies may be paid, and to the extent they're
15 earned at the time of the determination, that monies
16 that are not yet earned on the hourly rate equivalence
17 or otherwise might be then subject to forfeiture, which
18 could then, in effect, terminate the defense of the
19 defendant.

20 The reasonableness issue I have had no problem
21 with because all fees, at least in our state, are
22 subject to reasonableness review on motion of the
23 client before the bar or the court.

24 CHAIRMAN LEINENWEBER: As I understand your
25 motion, it's to amend Section 505(c) at Line 10 by

1 deleting the word "earned" and inserting the word
2 "received." Is that correct?

3 COMMISSIONER APPELWICK: That is correct.

4 CHAIRMAN LEINENWEBER: Discussion on that
5 motion from the committee?

6 COMMISSIONER PATRICK C. GUILLOT (Texas): One
7 of the problems with that is that if you don't require
8 them to earn it, they can be paid a fee of a half a
9 million dollars, which turns out to be drug money.
10 They haven't done anything to earn it, or maybe no more
11 than, say, \$25,000 of it. They get to keep the
12 \$500,000 fee. They may have an agreement with their
13 client that the defense will be \$200,000, so the drug
14 dealer gets \$300,000 back. In other words, the lawyer
15 acts as a bailee, or, if you will, a fence for the
16 money.

17 You overcome that problem with the language
18 that we have. I don't know any lawyer -- or I am not
19 sure any state would allow a lawyer, even if his fee is
20 a reasonable fee in terms of an hourly rate, to keep
21 anything that wasn't earned. So I think we need to
22 leave in there what the language is that we have worked
23 on over a four-year period.

24 I want to ask Harry if I am incorrect on my
25 analysis of this from the standpoint of the Justice

1 Department.

2 MR. HARRY HARBIN: That is substantially the
3 view of the Department of Justice prosecution
4 guidelines. Time of transfer occurs when the money is
5 actually earned by the attorney, so that retainers paid
6 in advance would remain subject to forfeiture.

7 COMMISSIONER CURTIS R. REITZ (Pennsylvania):
8 Mr. Chairman, again, this comes back to the question of
9 the relationship between 505 and 511. 511(a) does
10 permit a court to release funds to the defense even
11 though they're subject to seizure. So, 505, in saying
12 that receipts are not protected, only earned fees are
13 protected, does leave it possible for a lawyer who did
14 receive a very large retainer, with part of it not yet
15 being earned at the time of a judicial determination,
16 to ask a court, under 511, for release of further funds
17 for further service to be rendered to the defendant.

18 CHAIRMAN LEINENWEBER: The motion is --

19 COMMISSIONER JAMES A. YATES (New York): On
20 that point, if I may. I think this may be more a
21 question of form than of substance. I think the sense
22 of what you really want to say is that anything that
23 was received before judicial determination is kept, as
24 long as either prior to that judicial determination or
25 subsequent thereto it was earned.

1 I mean, that is the sense of what you're
2 trying to say, I think. The situation that was raised
3 by one of the committee members -- and that is, a large
4 fee received and never earned -- is not the situation
5 you're trying to protect against, I don't think.

6 I think, if I am right in my interpretation of
7 what the sense of your motion was, it may be just by
8 amending the language in the beginning to define
9 reimbursement of expenses related to legal services
10 actually performed, and then, later on, amend "earned"
11 to be "received." And that way, you'll have guarded
12 against the prospect of a windfall fee and you will
13 talk about legal services being exempt -- or, excuse
14 me, a fee for legal services being exempt from
15 forfeiture if it was received before the declaration of
16 forfeiture and either prior or subsequent thereto it
17 was earned.

18 COMMISSIONER MARLIN J. APPELWICK (Washington):
19 My concern is that you have gone farther. I concur
20 with Commissioner Guillot's hypothetical. If someone
21 is paying money, in essence, to shelter it, to bail it,
22 to simply hide it so it is available when they are
23 released from prison, or otherwise, I have no problem
24 with what money being subject to forfeiture at any
25 point in time.

1 My concern is that, again, this is an
2 interruption of the defense. If I contract with a
3 client to represent them for a \$10,000 retainer, within
4 three days there may be a motion to forfeit funds.
5 Under my contract, that retainer is earned, period.
6 It's not refundable. It's subject only to the civil
7 question of reasonableness. If that was \$100,000, the
8 same is true. If it were subsequently determined
9 reasonable or I subsequently was demanded to refund to
10 the client or offered a refund, I have no problem with
11 that excess being forfeitable at that time.

12 But when it is a matter of contract and
13 receipt by me before the knowledge or the judicial
14 determination, I see it only as an intrusion to the
15 attorney-client relationship for there to be any
16 forfeiture. Basically you're saying that -- take the
17 \$100,000 hypothetical. I will receive that. After the
18 first week of representation, I have not earned
19 \$100,000. Perhaps I have earned ten. Can the state
20 then forfeit the balance and I have to then go back to
21 court and plead? Does it prejudice the client not to
22 have had those funds released for that representation,
23 or does it force them to a public defender agency,
24 which isn't necessarily in the state's interest? Why
25 the intrusion if there is a bona fide contract, if the

1 funds are received in advance of the forfeiture
2 determination? And I would totally support adding a
3 requirement that any refund, rebate to the client at
4 any time, is subject to recapture as a forfeiture.

5 COMMISSIONER DAVID A. GIBSON (Vermont): The
6 committee discussed this problem at some length on more
7 than one occasion. The way it came out was to -- as
8 indicated in the language, with the understanding that
9 such an interruption may in fact take place. Then the
10 lawyer is faced with that choice of continuing on
11 without expectation of pay; applying to the court to
12 become assigned counsel, hopefully with pay, at least
13 insofar as the state's scheme permits payment for
14 assigned counsel; or to have the defense turned over to
15 a public defense type of lawyer.

16 Now, those choices may not be happy ones, but
17 they are the ones that would exist under this
18 situation. And the choice of the committee was quite
19 deliberate in putting that burden on the lawyer at that
20 point in time when the money does have to be turned
21 over to the government.

22 CHAIRMAN LEINENWEBER: Ready for the question?
23 The question is, shall Paragraph 505(c) at Line 10, the
24 word "earned" be stricken and the word "received" be
25 placed in lieu thereof?

1 All in favor, say "aye."

2 All opposed. The "noes" have it. The motion
3 fails.

4 Further discussion on Section 505?

5 COMMISSIONER FRED H. MILLER (Oklahoma): I
6 have been puzzling for a while over (a)(2). I think I
7 may finally have figured it out, but I'd like to ask
8 the committee if that is correct. It strikes me you're
9 not talking about an actual conveyance, you're talking
10 about a hypothetical. That is to say, the person whose
11 conduct gave rise to the forfeiture simply had no
12 authority to convey the property. It's not that there
13 was an actual conveyance or something of this nature,
14 is that correct?

15 COMMISSIONER GIBSON: I will rush in where
16 fools don't usually go. The committee's feeling on
17 this one was that, laying aside working out the civil
18 ramifications, is that if a person in apparent
19 authority did convey some property that belonged to
20 another person who had a claim for exemption, that that
21 apparent authority to convey could be undermined and
22 that the person whose property was so delivered to
23 another person would have the opportunity to get it
24 back.

25 I haven't explained it very well, but I think

1 you understand what I am trying to say here, that the
2 bad guy really didn't have the authority, but somehow
3 it appeared that he did, and the innocent owner should
4 be able to cut through that process and claim his
5 exemption so that the government doesn't end up with
6 the property.

7 CHAIRMAN LEINENWEBER: Any further discussion
8 on 505?

9 COMMISSIONER MILLER: Could I make a
10 suggestion that there might be some redrafting, as long
11 as you're going to return to this section. I think
12 what you are really saying is, the person who had the
13 conduct that gives rise to forfeiture had simply no
14 authority to deal with the property of the person
15 claiming the exemption.

16 It might be a little cleaner if you say
17 that -- either in the statute or at least give an
18 example in the comment that would kind of highlight it.

19 CHAIRMAN LEINENWEBER: Yes.

20 COMMISSIONER MARLIN J. APPELWICK (Washington):
21 I would like to simply request of the committee that
22 you would expand your comment on 505 to explain your
23 intention as to the workings of 505(c) -- will help in
24 the adoption process.

25 COMMISSIONER RAYMOND P. PEPE (Pennsylvania):

1 I have a question about the intended scope of 505(c).
2 As the committee is aware, conduct giving rise to
3 forfeiture can involve violations of the act or conduct
4 which could potentially result in prosecution for
5 violations of the act, as well as violations of laws of
6 other states, as well as aiding or abetting violations
7 of the act.

8 As 505(c) is now drafted, however, the
9 exemption only applies to persons charged with offenses
10 under the act or who may be so charged, and not other
11 persons subject to forfeiture under 505(2) and (3).

12 Is this a drafting error or an intentional
13 limitation in the scope of 505(c)?

14 COMMISSIONER GIBSON: Do I assume that you
15 have in mind perhaps something like the Monsanto
16 situation where lawyers received fees for other
17 purposes and that it turned out to be from drug money?

18 COMMISSIONER PEPE: No. What I have in mind
19 is, when you go back to 503, there are three classes of
20 conduct that can give rise to forfeiture. 503(1)
21 refers to acts or omissions punishable under the act.
22 And (2) talks about acts or omissions punishable under
23 the acts of other states. And (3) talks about acts or
24 omissions committed in furtherance of a violation of the
25 act.

1 Now, when you move over to 505(c), the
2 exemption is only applicable to persons who have been
3 charged or may be charged with an offense under the
4 act. Why isn't the exemption also applicable to people
5 subject to civil forfeiture for violations under 503(2)
6 and (3)?

7 COMMISSIONER GIBSON: I think under 503(3) --
8 would qualify under 505(c). Civil forfeiture -- this
9 is a narrow exemption that was not designed to be
10 applied other than in criminal defense situations.

11 COMMISSIONER PEPE: Well, I would hope the
12 committee would think about it, and I would just leave
13 it as a suggestion, that the individual who is being
14 criminally prosecuted probably is somewhat more
15 culpable than the person who is only subject to civil
16 forfeiture. Why should we have a rule that benefits
17 the more culpable individual more than arguably the
18 less culpable individual?

19 CHAIRMAN LEINENWEBER: Commissioner Langrock.

20 COMMISSIONER PETER F. LANGROCK (Vermont): I
21 want to touch upon Section 4 briefly. I understand you
22 are going to go back and rewrite it. I want to make it
23 clear that I think the appropriate policy that you've
24 got to deal with -- and that is, not to allow
25 forfeiture, which amounts to the same thing as a

1 heavy-duty fine, to, in effect, become the controlling
2 element in allegedly criminal conduct.

3 Under our Constitution, a person should not
4 forfeit their property or their life or liberty without
5 due process of law. Due process has meant for a long
6 time, in the criminal context, beyond a reasonable
7 doubt. I would hate to see us have a statute which
8 says we are going to abandon the criminal process --
9 statute which allow us to abandon the criminal
10 process -- and go and get these people by a
11 preponderance of the evidence rather than guilt beyond
12 a reasonable doubt.

13 In a day of hysteria, a day of concerns, the
14 standard of more likely than not is not a standard by
15 which I think criminal behavior should be defined. And
16 even though it may not be in the form of an indictment
17 or in the form of information, but only in a forfeiture
18 procedure, to suggest that that is really a civil
19 procedure, that is really something different, is
20 totally untrue.

21 If you read in the newspaper that so and so
22 has forfeited great sums of property because of their
23 criminal activities and it's been done by a
24 preponderance of the evidence, I think we are doing a
25 great injustice to the overall system.

1 CHAIRMAN LEINENWEBER: Any further discussion?

2 COMMISSIONER ELLEN F. DYKE (District of
3 Columbia): Well, it's even worse than that. To the
4 extent that you can have a forfeiture on probable
5 cause, you can have a trial, and the person could
6 actually be found not guilty because they were innocent
7 when the forfeiture has occurred.

8 CHAIRMAN LEINENWEBER: Further discussion?
9 Commissioner.

10 COMMISSIONER DAVID T. PROSSER, JR.
11 (Wisconsin): On 505(c), what is the intent of the
12 committee with respect to property rendered for legal
13 services that are given to a person charged under the
14 act, but the services are for something else --
15 contract, a divorce case, a murder -- anything that
16 isn't under the act.

17 COMMISSIONER DAVID A. GIBSON (Vermont): That
18 type of situation would be governed by the other
19 exception in forfeiture provisions. In other words, an
20 attorney who received payment that ultimately came from
21 drug funds in connection with rendering other legal
22 work would be no different than the banker who received
23 payment on a loan that may have in fact come from drug
24 transactions type thing.

25 We don't wish to set up a separate category

1 for attorneys in connection with services rendered on
2 other matters. We will let those be treated just like
3 any other business, business person.

4 CHAIRMAN LEINENWEBER: Further discussion.

5 COMMISSIONER PROSSER: If I may. As I read
6 this, the way it's drafted, this would apply to legal
7 services rendered on other matters. At least it's a
8 very ambiguous wording.

9 COMMISSIONER GIBSON: I would suggest you
10 contemplate how that would work under the exemption
11 provided in 505(a)(2), I mean (a)(1)(ii).

12 CHAIRMAN LEINENWEBER: No further discussion?

13 COMMISSIONER BERNARD HELLRING (New Jersey):
14 Mr. Chairman, on the same question. I quite agree with
15 the commissioner who last spoke. It seems to me quite
16 clear that the language of 505(c) does exempt any legal
17 fees that are paid to a lawyer for any services
18 performed for the culprit involved, regardless of the
19 provision of any other section.

20 I think the commissioner's comments are quite
21 correct. I agree with that rule. I agree with that
22 result. I think it's a good result. I am not
23 suggesting that it be changed. I think it's quite
24 clear that that is what the section means. If a
25 culprit has been involved in a divorce case with her

1 husband and she has been receiving legal services and
2 pays for them, then the money he has received, the
3 lawyer has received for those fees belongs to that
4 lawyer. And this section does not apply, as it reads,
5 only to work done by the lawyer in defending her
6 against a charge of an offense under this act.

7 Moreover, I don't think the section is at all
8 clear even that it limits its terms only to defense of
9 the culprit against criminal offenses. There are all
10 sorts of things which are called defenses even though
11 they're civil. And if you want to limit the meaning of
12 505(c) to just that very narrow thing of services
13 performed only in connection with the drug offense and
14 only in connection with the criminal aspects of drug
15 offense, I think the section has to be redrafted. I
16 hope you don't do it, because I like it the way it is.
17 I think it's quite clear to me that lawyers should be
18 in a special category because we are dealing here with
19 defense and legal services performed for a person, and
20 I don't see any basis for catching them up.

21 The bankers situation is entirely another
22 situation. I heard Mr. Langrock even get up and speak
23 for the banks. Nobody paid any attention to him. But
24 I am not talking for the lawyers. I think your section
25 does it all for the lawyers as it is. I would suggest

1 you not play with it. But I want you to know, at least
2 to me, as to the last speaker, it has those meanings.

3 Thank you.

4 CHAIRMAN LEINENWEBER: Please read Paragraph
5 506.

6 COMMISSIONER JAY BURINGRUD (North Dakota):

7 "SECTION 506. SEIZURE OF PROPERTY FOR
8 FORFEITURE.

9 "(a) Property subject to forfeiture under
10 Section 504 may be seized for forfeiture by
11 [appropriate person/agencies] upon process or a seizure
12 warrant issued by any [appropriate court], on an
13 affidavit demonstrating that probable cause exists for
14 its forfeiture or that the property has been the subject
15 of a previous final judgment of forfeiture in the courts
16 of any state or of the United States. The court may
17 order that the property be seized on such terms and
18 conditions as are reasonable. [The order may be made
19 in connection with a properly issued search warrant.]

20 "(b) Except for real property, property
21 subject to forfeiture under Section 504 may be seized
22 for forfeiture without process if the property is
23 seized under circumstances in which a warrantless
24 seizure or arrest would be reasonable and if there is
25 probable cause to believe that the property is subject

1 to forfeiture under this [Act]. A law enforcement
2 officer may request a person having custody or control
3 of property subject to seizure under this section to
4 deliver the property to an officer of the court or to a
5 law enforcement officer. Real property may not be
6 seized without an adversarial judicial proceeding.

7 "(c) Seizure under this section must be
8 accompanied by an assertion by the seizing agency or an
9 attorney for the state that the property is seized for
10 forfeiture.

11 "(d) Property may be seized constructively.
12 Every constructive seizure of property must include
13 posting notice of pending forfeiture in a conspicuous
14 place on the property, giving notice of pending
15 forfeiture to its owners and interest holders as
16 provided in Section 507(c), and filing notice of
17 pending forfeiture or of a forfeiture lien in the
18 appropriate public records that relate to the type of
19 property seized.

20 "(e) The seizing agency shall deliver a
21 receipt to the person from whose possession or control
22 the property was seized. If no person is in possession
23 or apparent control, the agency shall attach the
24 receipt in a conspicuous place on the property or at
25 the place of its seizure. The receipt must contain a

1 general description of the property seized, the date
2 and place of seizure, the name of the seizing agency,
3 and the address and telephone number of the seizing
4 officer or other person or agency from whom information
5 about the seizure may be obtained.

6 "(f) As soon as practicable after seizure for
7 forfeiture, the seizing agency shall conduct an
8 inventory and estimate the value of the property
9 seized.

10 "(g) A person who acts in good faith and in a
11 reasonable manner to comply with an order of the court
12 or a request of a law enforcement officer is not liable
13 to any person on account of acts done in reasonable
14 compliance with the order or request. No liability may
15 attach from the fact that a person declines a law
16 enforcement officer's request to deliver the property.

17 "(h) A possessory lien of a person, from
18 whose possession property is seized, is not affected by
19 the seizure.

20 "(i) The jurisdiction of a court over
21 property subject to forfeiture is not affected by a
22 seizure, with or without process, in violation of the
23 federal or state constitution."

24 CHAIRMAN LEINENWEBER: Discussion.

25 COMMISSIONER DONALD E. MIELKE (Colorado): A

1 couple of points in the draft here that need to be
2 pointed out. Wherever you refer to the word "receipt"
3 in paragraph, I believe, (e) on 112 and 113, that is
4 not defined anywhere as to what that receipt is. Maybe
5 in the comments you could point out that that could be
6 the legal notice, or the order or the TRO could also
7 qualify for that receipt. So you wouldn't have to
8 develop another separate document to post or give to
9 someone, that if you have a restraining order signed by
10 the court, you could just leave that and call that a
11 receipt also.

12 Also under the inventory on paragraph (f),
13 lines 7 and 9 on 113, maybe to again make it clear in a
14 comment that the inventory can be conducted by any
15 reasonable means. In Colorado, we use videotaping, and
16 that has satisfied everyone, has been quick and
17 efficient and a very good way to go, and I think most
18 states are going that way, and maybe include that, that
19 inventory by any reasonable means, including
20 videotaping, either include that in the draft or in a
21 comment so we can expedite that.

22 Does the committee want to comment on that?

23 CHAIRMAN LEINENWEBER: Anyone want to comment?

24 COMMISSIONER MICHAEL D. HAWKINS (Arizona):

25 Just a question to the committee. Do I understand

1 under 506, reading 507(c), which is mentioned in it,
2 that real property could be taken following a hearing
3 where the only notice to the property owner, other than
4 a posting on the property, would be the mailing of a
5 notice by regular mail?

6 COMMISSIONER DAVID A. GIBSON (Vermont): The
7 matter of seizure of real property can be done
8 constructively as well as by actual going into
9 possession of it.

10 What we say is that seizure of real property
11 may not be done without an adversarial judicial
12 proceeding. That, I think, contemplates notice to the
13 claimant of the property and an opportunity for a
14 hearing before a judge.

15 COMMISSIONER HAWKINS: Regular mail service
16 would not be enough?

17 COMMISSIONER GIBSON: It would depend on the
18 individual state's requirements for the process by
19 which service can be made.

20 COMMISSIONER HAWKINS: Roger Henderson takes a
21 year's sabbatical from the University of Arizona, rents
22 his house to two students. While he is gone, they
23 engage in dope trafficking. Property is posted. You
24 mail a notice to his post office box. He is in
25 Yugoslavia studying and he doesn't come back for a

1 year.

2 Can you take his property?

3 COMMISSIONER GIBSON: If notice can be given
4 effectively to the absent owner, yes.

5 CHAIRMAN LEINENWEBER: Commissioner Read.

6 COMMISSIONER HAROLD E. READ, JR.

7 (Connecticut): Yes. I am having good-faith trouble
8 today. A minute ago, I had the problem with how a
9 lawyer receives a payment of a fee in bad faith.

10 Now in section (g) on 113, how can I in bad
11 faith follow the proper instructions of a law
12 enforcement officer, or how can I other than -- what
13 the hell difference does it makes what kind of faith I
14 have?

15 COMMISSIONER GIBSON: I think what the
16 committee had in mind is that sometimes law enforcement
17 officers can give instructions that are totally
18 illegal, and the person receiving them knows it and
19 should just tell the law enforcement officer to go take
20 a hike.

21 COMMISSIONER READ: If that is the case, I
22 move to strike the language.

23 COMMISSIONER GIBSON: So that we want to make
24 sure that when a person does comply with the order,
25 that the person is doing so in good faith. I don't

1 know whether bad faith would be a problem or not, but
2 we don't see any harm in having those words in there.

3 COMMISSIONER READ: I think you're telling me
4 that because a law enforcement officer could make a
5 demand in excess of his authority, and I should
6 recognize it and tell him "that is in excess of your
7 authority and I will not do it," and if I recognize
8 that it's in excess of his authority, but I say, "what
9 the hell, he's the law enforcement officer, I better do
10 it," now I have gone from good faith to bad faith.

11 I just can't live with that. So, as I say, I
12 will move to strike the language "in good faith" in
13 this context.

14 CHAIRMAN LEINENWEBER: Is that in subparagraph
15 (g)?

16 COMMISSIONER READ: Yes.

17 CHAIRMAN LEINENWEBER: The motion is to strike
18 the words "who acts in good faith"?

19 COMMISSIONER READ: Yes.

20 CHAIRMAN LEINENWEBER: Paragraph (g) on Page
21 113 of Paragraph 505.

22 COMMISSIONER READ: Responding to the audience
23 here, I'd also like to strike "and in a reasonable
24 manner."

25 CHAIRMAN LEINENWEBER: So, "a person who acts

1 in good faith and in a reasonable manner," the
2 gentleman moves to delete those words.

3 Is there discussion of the motion? If not,
4 are we ready for the question? Does the committee wish
5 to comment on the motion?

6 COMMISSIONER REID C. PIXLER (Colorado): Yes.

7 CHAIRMAN LEINENWEBER: All in favor, signify
8 by saying "aye."

9 All those opposed.

10 It appears that the "ayes" have it. The
11 motion carries.

12 CHAIRMAN LEINENWEBER: Over here, I believe.
13 Commissioner.

14 COMMISSIONER ALLAN G. RODGERS (Massachusetts):
15 Three quick comments. First of all, in subsection (b)
16 on Lines 8 and 9 on Page 112. Since leaseholds or
17 tenancies may be considered personal property rather
18 than real property, I think when you look over what
19 you're going to look at, I hope on tenancies you keep
20 that in mind. Because the word "real property" may not
21 be effective to cover those.

22 Secondly, in subsection (c), Line 11, you're
23 talking about accompanied by an assertion. I take it
24 you mean a written assertion. Probably ought to say
25 that. You don't want somebody to simply make an oral

1 statement.

2 Thirdly -- this is on Line 11, Page 112.

3 Seizure must be accompanied by an assertion. Probably
4 mean written assertion of some kind.

5 The final question I have is on subsection
6 (i). I am not sure what the committee means by this.
7 There is a reference to some case decisions in the
8 federal system on this point: The jurisdiction of the
9 court is not affected by the seizure in violation of
10 the constitution.

11 But I am unsure what you mean by the language.
12 If all you mean is that the mere fact that there is an
13 unconstitutional action does not deprive the court of
14 jurisdiction, but you mean of course the court has the
15 power to go ahead and decide that it's
16 unconstitutional, then I don't think I have a problem
17 with it. But if you mean something broader than that,
18 maybe I have a problem with it. So, if you could
19 explain, it would help me understand what you mean.

20 COMMISSIONER GIBSON: The intent on (i) is
21 that, exactly as you suggested, so that we make sure
22 the court has the power to order the persons who seized
23 that property without or in violation of the
24 Constitution, that the court can order that person to
25 turn it over to its rightful owner.

1 CHAIRMAN LEINENWEBER: Further discussion on
2 this section?

3 COMMISSIONER BRADLEY J.B. TOBEN (Texas): On
4 Page 113, section (h), I think that this language
5 creates an unintended safe harbor against forfeiture of
6 possessory security interests.

7 Read literally, a possessory security interest
8 is not subject to forfeiture. It says that it will not
9 be affected by the seizure. I think that what was
10 intended by this section is that if we are dealing with
11 a possessory security interest, that seizure of the
12 property would not affect the interest insofar as
13 possession is a prerequisite to the establishment of
14 the lien. It certainly can't mean what it means
15 literally. Otherwise, we have a wide-open safe harbor.

16 COMMISSIONER GIBSON: What we had in mind is
17 the person who may do some work on a piece of goods and
18 have a possessory lien until that work is paid for by
19 the owner, such as a car repair, TV repair, whatever.
20 Those are what we had in mind in terms of possessory
21 liens, and that if in fact it turns out to be
22 forfeitable and the law enforcement folks swoop in and
23 take it away, that that doesn't destroy the basis for
24 the lien, even though the lien is only effective so
25 long as the person possesses it. We want to make sure

1 that in losing possession, you don't lose your
2 possessory lien.

3 COMMISSIONER TOBEN: I agree with you entirely
4 on that, but I don't think that language here does
5 that. The language creates a very broad protection
6 because it says it's not affected by the seizure, which
7 leads me to believe that the property -- the interest,
8 that is -- would not be forfeited.

9 What I propose is simply a clarification. The
10 words I would add would be, "insofar as possession is a
11 prerequisite to the establishment of the lien," to make
12 it clear that if the other requirements of the act are
13 met in regard to forfeiture, that that type of interest
14 can be forfeited.

15 COMMISSIONER GIBSON: We might well add that
16 language, if you could write it out and bring it up to
17 us.

18 CHAIRMAN LEINENWEBER: Commissioner.

19 COMMISSIONER JAMES C. MCKAY, JR. (District of
20 Columbia): The comments say this is based on 21 USC
21 881. However, the federal law of subsections (f) and
22 (g) permit us summary forfeiture of controlled
23 substances themselves and plants from which they can be
24 derived.

25 I am wondering if there was an intention to

1 deviate. Apparently, the way this is written, they
2 would be treated like any other property, even if it
3 was -- you're talking about heroin or something. I am
4 just wondering if there was an intention to deviate
5 from the federal law.

6 I mean, 21-881(f) says all controlled
7 substances are deemed contraband and seized and
8 summarily forfeited to the United States. And it seems
9 to provide an automatic forfeiture that you don't have
10 to get a search warrant for, perhaps.

11 COMMISSIONER GIBSON: I am having trouble
12 following what you think should be done.

13 COMMISSIONER McKAY: I am just asking you --
14 your drafting comments say this is based on the federal
15 forfeiture statute. I am just pointing out that the
16 federal forfeiture statute has special provisions for
17 controlled substances themselves, and plants that are
18 used in the manufacture.

19 And apparently, as I read it -- perhaps the
20 federal adviser could correct me -- that they can be
21 summarily seized. They're deemed contraband by
22 operation of law and you don't have to go through a lot
23 of the procedures you'd have to go through to forfeit a
24 car.

25 COMMISSIONER GIBSON: I am told you should

1 look at Page 144 of the draft, also at Section 504(1).
2 Obviously, forfeitable property includes those items.

3 COMMISSIONER MCKAY: Well, I don't know.
4 Maybe the federal adviser could answer my question.

5 MR. HARRY HARBIN: You're quite correct, in
6 that controlled substances in Schedules 1 and certain
7 controlled substances in Schedule 2 have always been
8 designated contraband and are summarily forfeitable
9 because they can't be possessed by anyone except under
10 restrictions -- can't be illegally possessed by anyone.
11 So we have this summary forfeiture provision.

12 We have a very similar provision here in the
13 UCSA in Section 520 on summary forfeiture of controlled
14 substances included in Schedule 1. It says it's
15 contraband.

16 COMMISSIONER ROBERT H. CORNELL (California):
17 Also on sub (c), I have a question. How does the
18 enforcing agent know that he has complied with (c)?
19 Who is the assertion made to? Who is it delivered to?
20 How is it made?

21 It's hard for me to see by this how to advise
22 my police officers what their responsibility is in a
23 seizure situation.

24 COMMISSIONER GIBSON: The reason for this
25 section I think is stated in the comment, but the

1 assertion would be made either to the person from whom
2 the property is seized or at a later date, which is why
3 it may be done by the attorney for the state. After
4 research and determining who the actual owner is, then
5 that individual would be notified of the seizure and
6 the assertion that it is being seized for forfeiture
7 under this act.

8 I think the suggestion that it be required to
9 be in writing is a good one, and we will probably add
10 that in there. And perhaps we can flesh out the
11 comment to indicate what we meant.

12 COMMISSIONER CORNELL: Would you consider some
13 language to indicate that this assertion would be
14 delivered with the notice to the appropriate person?

15 COMMISSIONER GIBSON: There are various ways
16 by which persons may receive notification of proceeding
17 or a filing of a lien. I think those would satisfy
18 this requirement of an assertion that the property is
19 being subjected to forfeiture proceedings. So, I don't
20 know as we need to duplicate that paperwork in that
21 respect.

22 COMMISSIONER CORNELL: You're saying this is
23 in other provisions under the notice requirements?

24 COMMISSIONER GIBSON: There are other
25 provisions for notification in connection with

1 forfeiture of property, correct.

2 COMMISSIONER CORNELL: Okay.

3 CHAIRMAN LEINENWEBER: Commissioner.

4 COMMISSIONER PETER F. LANGROCK (Vermont): I
5 am trying to figure out how this works. I take it a
6 prosecutor -- and I was one once for five years --
7 would come to a court and have an affidavit, and the
8 affidavit would say, "I have a confidential informer
9 who is reliable, who tells me that car was used in a
10 drug matter," so the court issues an order, based upon
11 that affidavit, to go out and seize the car.

12 Am I right so far? Is that the way the
13 procedure works?

14 COMMISSIONER REID C. PIXLER (Colorado): It
15 may.

16 COMMISSIONER LANGROCK: The question I have
17 is, is it all over with then? Does the fact that there
18 was an affidavit which had reasonable cause at that
19 time make the forfeiture appropriate? Or do we have
20 another standard which says that there actually has to
21 be something further at some point in the act?

22 COMMISSIONER GIBSON: The standard of proof to
23 determine that property is forfeitable is that there be
24 evidence that it was used in connection with the
25 violation.

1 Now, the burden of proof at this point is that
2 it be shown by a probable cause standard. But there
3 does have to be that level of proof.

4 COMMISSIONER LANGROCK: If I come in and
5 challenge -- I mean, I take it I come back and
6 challenge later on -- do I challenge at that point that
7 this car really wasn't used by a preponderance of the
8 evidence or do I have to challenge that there wasn't
9 probable cause at the time of the seizure?

10 COMMISSIONER GIBSON: You can challenge on
11 either basis. In other words, if you can destroy the
12 allegation that there -- of probable cause and show
13 that in fact there was none, you win, hands down.
14 Otherwise, you have to go on and establish through a
15 preponderance of the evidence that despite the probable
16 cause shown, in fact, the property is not subject to
17 forfeiture, and then you win at that level also.

18 COMMISSIONER CURTIS R. REITZ (Pennsylvania):
19 If I could just supplement what the chairman of the
20 Drafting Committee said, Peter. I think you may be
21 misled by the phrase "seizure for forfeiture" into
22 thinking this is a forfeiture section. It's not. It's
23 a seizure section. And we might be much better in our
24 drafting if we just, every time we said "seizure,"
25 dropped the words "for forfeiture." This is not the

1 situation to forfeit the asset. This is only the
2 decision to seize the asset. And a seizure is not a
3 forfeiture.

4 COMMISSIONER LANGROCK: That would make me a
5 lot happier. The standard here is for seizure, not for
6 forfeiture at this point.

7 COMMISSIONER REITZ: That is correct.

8 COMMISSIONER NEAL OSSEN (Connecticut): Do I
9 take it that the only time a court can decide to allow
10 the seizure for the hearing is if he was to seize real
11 property, but any other personal property can be seized
12 without any court hearing?

13 COMMISSIONER GIBSON: It may or may not have a
14 prior determination by a court in terms of the seizure.
15 What could happen is, a police officer comes along and
16 discovers a drug deal going on, makes the arrest,
17 seizes, say, the car, if the car was being used in
18 connection with the drug dealing, right on the stop.
19 He obviously isn't going to go back to the court and
20 get a warrant to seize the vehicle. He can make a
21 seizure of the vehicle at the time of the arrest as
22 being involved in the criminal conduct.

23 COMMISSIONER OSSEN: But that is because he
24 has made an arrest. Do I take it that in non-arrest
25 situations, property still -- personal property can

1 still be seized because some affidavit is given to a
2 judge saying that this property was used in the
3 commission of a crime?

4 COMMISSIONER GIBSON: If a seizing official
5 goes to a court and presents evidence, by whatever
6 means, to justify getting a court order to seize it,
7 sure. Then you litigate the merits of it later.

8 COMMISSIONER OSSEN: Has this committee ever
9 read Sniadach?

10 COMMISSIONER GIBSON: Oh, yes.

11 COMMISSIONER OSSEN: And this committee
12 doesn't feel that what I perceive Sniadach to mean,
13 that people have a right to a hearing before property
14 is taken -- doesn't it apply in this case?

15 COMMISSIONER GIBSON: That is correct.

16 COMMISSIONER OSSEN: Then I am going to move,
17 Mr. Chairman, that the preceding -- that the language
18 used for seizure of real property include personal
19 property, because I can't believe that this conference
20 would like to overturn Sniadach.

21 CHAIRMAN LEINENWEBER: Where are you putting
22 this?

23 COMMISSIONER OSSEN: I will leave that to the
24 Drafting Committee.

25 COMMISSIONER JAMES A. YATES (New York): Page

1 112, Lines 8 and 9.

2 COMMISSIONER OSSEN: I want to say that we
3 have a statement that says no property may be seized --

4 CHAIRMAN LEINENWEBER: So, you want real and
5 personal property --

6 COMMISSIONER OSSEN: -- without an adversarial
7 judicial proceeding.

8 CHAIRMAN LEINENWEBER: The motion is that
9 paragraph (b) of Section 506 be amended at Pages 8 and
10 9 to state as follows: No property may be seized
11 without an adversarial judicial proceeding.

12 Is that correct, sir?

13 COMMISSIONER OSSEN: Yes.

14 COMMISSIONER PATRICK C. GUILLOT (Texas): That
15 is not the law now, nor should it be. Under ordinary
16 circumstances, you will have a hearing -- not an
17 adversarial hearing, but you will have a hearing based
18 on an affidavit before a magistrate, stating that I, so
19 and so, saw Mr. "X" making one of these designer drugs
20 and so forth and so on. And the judge, after having a
21 hearing, can issue a warrant for you to go seize that
22 property.

23 That is the current law. That is what is
24 done. If, however, a police officer walks by a garage
25 and sees me making illegal drugs, he can make an arrest

1 right then and he can seize those pots and pans and all
2 the chemicals that are being used to make that without
3 having to go downtown and ask a judge for a warrant to
4 come back and seize it. That is the current law, and
5 there is no reason to change it.

6 COMMISSIONER JAMES A. YATES (New York): Would
7 the maker of the motion accept a friendly amendment
8 that I think solves Commissioner Guillot's problem?
9 That is, I think what you really want to say is that no
10 property may be seized for purposes of forfeiture
11 without an adversarial judicial proceeding.

12 In other words, you don't want to disturb the
13 existing law where seizures are done for evidentiary
14 purposes as described.

15 COMMISSIONER NEAL OSSEN (Connecticut): I
16 certainly accept the friendly amendment.

17 CHAIRMAN LEINENWEBER: The motion has been
18 amended by agreement of the author to read: No
19 property may be seized for purposes of forfeiture
20 without an adversarial judicial proceeding.

21 Any further discussion on the motion?

22 COMMISSIONER REID C. PIXLER (Colorado): You
23 might as well do away with the whole act if you are
24 going to be looking at this.

25 The ability to find, locate and control,

1 particularly liquid assets or highly concealable
2 assets, is a critical aspect of the forfeiture
3 proceedings. And they're federally done, done in every
4 state in the union that is participating in a kind of
5 forfeiture proceeding at the present time that involves
6 a hearing and application that is very similar to the
7 search warrant application. And that proceeding causes
8 the property to be located and held so it can be
9 disposed of according to the court's determinations.

10 If you do away with the ability to control
11 that property, so that it can be concealed, it can be
12 dissipated, it can be disposed of until there is a
13 formal hearing and a court proceeding, there won't be
14 any assets left to forfeit. They will be concealed.
15 You've got to recognize that that will be the
16 motivation of the drug dealer that is involved in that.

17 If you say on Tuesday we are going to forfeit
18 your -- or seize -- your \$100,000 in a hearing, it will
19 be gone, I guarantee you. There will be no ability to
20 locate that and bring it back within the jurisdiction
21 of the court. The purpose of the seizure warrant and
22 the application on an ex parte basis is the law. It
23 has been for a very long time. This is a dramatic
24 change and would basically be the ultimate loophole.
25 If you are seeking to create loopholes to defeat the

1 act, that will do it.

2 CHAIRMAN LEINENWEBER: Any further discussion
3 on the -- Commissioner Mielke.

4 COMMISSIONER DONALD E. MIELKE (Colorado): I
5 absolutely agree with Commissioner Pixler. This guts
6 the act. There is no doubt about it that this will gut
7 forfeiture.

8 If you have to change the body of law now in
9 all the 50 states that in fact you have a temporary
10 restraining order, or how it's approached to go and get
11 that warrant to go seize that property, to
12 differentiate whether you are arresting the guy or
13 whether you're doing seizure all at the same time, and
14 to say, well, if it's done, for procedural purposes,
15 you have to have an adversarial proceeding, it's just
16 not going to happen.

17 Commissioner Pixler is absolutely right. The
18 property will be gone come Tuesday. So, if you want to
19 gut forfeiture, pass this motion.

20 COMMISSIONER PETER F. LANGROCK (Vermont):
21 You're not going to believe this, but I agree with the
22 last two speakers. I think that this situation -- we
23 are talking here not about forfeiture, but about
24 seizure, getting control of it, and getting control of
25 it based upon a judicial finding of probable cause.

1 That doesn't bother me. I don't like it. It's subject
2 to abuses. But I think that much is constitutional.

3 And I think you're right, that without that,
4 there is the whole forfeiture consent, which I probably
5 don't like anyhow, but if you are going to have an act,
6 I think that we should defeat this particular
7 amendment.

8 CHAIRMAN LEINENWEBER: Further discussion on
9 this motion?

10 Seeing none, all in favor, signify by saying
11 "aye."

12 All those opposed.

13 The motion fails. .

14 Further discussion.

15 COMMISSIONER ARTHUR E. BONFIELD (Iowa): I
16 would like to address (g) again on 113 and ask the
17 committee a question in light of its amendment.

18 As I understand what we have done on Pages 10
19 and 11, we have dropped from (g) the language "in good
20 faith and in a reasonable manner." As it now stands,
21 is there anyone that can see why the following
22 conclusion is not justified?

23 It seems to me, as (g) now stands, a police
24 officer and a private citizen can act in collusion,
25 with the police officer asking the private citizen to

1 do an illegal act, such as breaking into the residence
2 of a person to illegally remove the property to be
3 seized. And that private person, knowing that that act
4 is illegal, would not liable.

5 Am I correct in that reading?

6 COMMISSIONER REID C. PIXLER (Colorado): I
7 think so. The example that we were talking about when
8 we put the good faith and reasonable manner in was the
9 tow truck driver that picked the vehicle up because of
10 an order from a law enforcement officer, then merrily
11 drives off down the street at 80 miles an hour,
12 smacking the car into the telephone poles.

13 By taking out this language, you would say
14 that he could not be sued then.

15 COMMISSIONER BONFIELD: It seems to me that we
16 do not want a result, or at least I certainly don't
17 want a result where a police officer can issue an order
18 that the private citizens knows is illegal and then
19 complies with it and then is free of liability.

20 In fact, what this does is encourage collusion
21 between the police officer who wants to get an illegal
22 order enforced.

23 So I would suggest that we might add the
24 language on Line 12, "after a request of a law
25 enforcement officer," add the language, "believed to be

1 lawful." So it would read: A person who acts to
2 comply with an order of the court or a request of a law
3 enforcement officer believed to be lawful.

4 COMMISSIONER PIXLER: They will always say
5 they believed it was lawful.

6 COMMISSIONER BONFIELD: You need some
7 limitation, it seems to me, to avoid the problem of
8 collusion where the private person knows that the order
9 of the police officer is illegal, to prevent the police
10 officer, in effect, using the private person as an
11 instrument to accomplish an illegal result and then
12 this statute exonerating that private person from any
13 liability.

14 CHAIRMAN LEINENWEBER: Commissioner Read.

15 COMMISSIONER HAROLD E. READ, JR.

16 (Connecticut): On another subject. Do we really
17 know -- do you know? I don't -- what is an
18 adversarial judicial proceeding? I mean, if the
19 defendant doesn't show up and defaults, then it's not
20 adversarial and you can't foreclose? Or is it a
21 distinction between an ex parte and a non-ex parte?
22 What is it?

23 COMMISSIONER DAVID A. GIBSON (Vermont): What
24 was contemplated was that there at least be that
25 opportunity. And we would not think the opportunity

1 for that -- if a person doesn't show up, that that
2 would defeat the purpose of this section. We can
3 probably add some additional language to make clear
4 that if a person doesn't show up, so it's granted by
5 default, that it's still a valid seizure.

6 COMMISSIONER READ: Do me mean, for example, a
7 judicial proceeding after notice and opportunity to be
8 heard?

9 COMMISSIONER GIBSON: Something along those
10 lines.

11 COMMISSIONER READ: We could say that.

12 COMMISSIONER M. KING HILL, JR. (Maryland): On
13 the same point. I was going to raise it if
14 Commissioner Read didn't. I think that this
15 adversarial judicial proceeding is a concept that is
16 subject to many, many meanings, and therefore, so we
17 don't pass it by, I am going to move that the committee
18 be directed to draft, either by incorporation or
19 referral to other sections of the act -- such as the
20 probable cause section, or be free to draft its own
21 independent concept -- but at least to draft the
22 minimum requirements of this adversarial judicial
23 proceeding.

24 Because if you don't, we don't know, for
25 example, what must be shown in the adversarial judicial

1 proceeding, who has the burden of proof, when it must
2 be served, who must be given notice of it, and all
3 those factors that affect the judicial proceeding
4 before the real property can be seized. I don't think
5 you can send this out into the world without drafting
6 at least the minimum requirements of this so-called,
7 quote, adversarial judicial proceeding.

8 So, I will move that the committee be
9 instructed to draft in some manner -- by incorporating
10 other provisions of the act, however they choose -- the
11 bounds of this adversarial judicial proceeding.

12 CHAIRMAN LEINENWEBER: Commissioner Hill moves
13 that it be the sense of the House that the committee be
14 directed to draft the minimum requirements for
15 adversarial judicial proceedings.

16 Is that correct?

17 COMMISSIONER HILL: Correct.

18 CHAIRMAN LEINENWEBER: Is there discussion on
19 that motion? Commissioner Mielke.

20 COMMISSIONER DONALD E. MIELKE (Colorado):
21 Thank you, Mr. Chairman. I would agree with
22 Commissioner Hill to the extent that that troubled me
23 also, that we had this proceeding here, but nothing
24 follows up on it.

25 I will have drafting here for the committee's

1 consideration. What we do in Colorado is, we have a
2 forthwith hearing, hearing within days after seizure
3 for forfeiture, and then that petition to the court
4 setting forth the factual grounds and legal grounds is
5 then determined pending final disposition. And that
6 order of court does the same thing the committee drafts
7 in here in later sections -- I think in 507 or 508 --
8 that says that the terms and conditions that the court
9 sets are the same that the seizing agency can set, such
10 as security, maintenance, insurance, operation, terms,
11 upon that entity, then, if they are allowed to
12 re-occupy the real property.

13 So, I will give that to the committee. But I
14 agree with Commissioner Hill that the committee ought
15 to draft some sort of provision as to that area.

16 COMMISSIONER DAVID A. GIBSON (Vermont): In
17 Section 514 (i), the following language appears, "The
18 rules of civil procedure apply to all proceedings under
19 this [Article] unless a different procedure is provided
20 by this [Act]."

21 Would that not take care of your problem?

22 COMMISSIONER HILL: It does not, because in
23 514, you're talking about judicial forfeiture. This is
24 talking about what must take place before seizure of
25 real property. I think you need to deal with it

1 independently.

2 COMMISSIONER GIBSON: 514 applies to all
3 proceedings under this article.

4 COMMISSIONER HILL: It is labeled judicial
5 forfeiture proceedings, and the mere fact that you're
6 complying with the rules of procedure of the particular
7 court still does not set forth in your act the minimum
8 requirements of this adversarial judicial proceeding
9 before real property can be seized. I think you simply
10 must deal with that to satisfy the real estate lawyers.

11 COMMISSIONER GIBSON: Perhaps we disagree.

12 CHAIRMAN LEINENWEBER: I am not sure now that
13 there has been a resolution of your motion.

14 COMMISSIONER HILL: No. I think it calls for
15 a vote.

16 CHAIRMAN LEINENWEBER: Is there further
17 discussion on the motion? Seeing none, all those in
18 favor of -- I will restate it. The motion is that the
19 committee be directed to draft the minimum requirements
20 for the adversarial judicial proceeding in 506.

21 All those in favor, signify by saying "aye."

22 All those opposed.

23 The "ayes" appear to have it.

24 Further discussion. Commissioner Bonfield.

25 COMMISSIONER ARTHUR E. BONFIELD (Iowa): I

1 would like to make a motion on Line 12, Page 113, after
2 the word "or," I'd like to insert, "or in good faith
3 with," so it would read, "A person who acts to comply
4 with an order of the court or in good faith with a
5 request of a law enforcement officer is not liable to
6 any person on account of acts done in reasonable
7 compliance with the order or request."

8 The purpose of my motion is to avoid collusion
9 between a law enforcement officer and a private citizen
10 so that the private citizen is not exonerated from
11 liability where he or she acts in bad faith, knowing
12 that the officer's, the law enforcement officer's
13 action was illegal in making the request.

14 CHAIRMAN LEINENWEBER: That in part was the
15 subject of a motion by Commissioner Read to strike good
16 faith requirements for both the order of the court and
17 request of law enforcement --

18 COMMISSIONER BONFIELD: Right. But this only
19 applies good faith alone and to only the second, the
20 request of a law enforcement officer.

21 Originally, the motion that was struck, struck
22 it as to both elements.

23 CHAIRMAN LEINENWEBER: All right. We will
24 assume that is a different question. The motion is to
25 amend once again Section 506, paragraph (g), to insert

1 the words "in good faith" after the word "comply" on
2 Line 11.

3 COMMISSIONER BONFIELD: "In good faith with."
4 "Or in good faith with a request," yes. "In good faith
5 with," after the word "or."

6 CHAIRMAN LEINENWEBER: On that motion,
7 Commissioner Read.

8 COMMISSIONER HAROLD E. READ, JR.
9 (Connecticut): I still have this problem with good
10 faith in this context. Is this motion intended to
11 place the burden on the person complying with the order
12 to determine whether it's lawful or unlawful? Can you
13 answer that?

14 COMMISSIONER BONFIELD: It seems to me the
15 answer is not, that there is no such burden. So long
16 as that person acts in good faith, they don't know that
17 it's illegal, it seems to me they're okay. And that is
18 why it's placed in Line 12 after the word "or," so
19 that, A, it only applies to the request of the law
20 enforcement officer, not to the order of the court;
21 secondly, it only requires that they act without
22 knowledge that it's illegal, so they're not going to
23 have to guess on the lawfulness so long as they don't
24 know it's unlawful.

25 COMMISSIONER READ: That puts you back where

1 you were a little while ago when we were talking about
2 whether they believe it's a lawful order.

3 COMMISSIONER BONFIELD: No. Good faith, it
4 seems to me, is different than a belief as to
5 lawfulness -- as to its lawfulness. Good faith, in
6 effect, it seems to me, has got them back in the
7 situation where they are acting in a situation where
8 they don't know it's unlawful. That is the one --

9 COMMISSIONER READ: I think I oppose the
10 motion, sir.

11 CHAIRMAN LEINENWEBER: Commissioner Henderson.

12 COMMISSIONER ROGER C. HENDERSON (Arizona): I
13 would like to prevail on Commissioner Bonfield to
14 withdraw his motion, let the committee reconsider this.
15 This is far more complicated than just the little issue
16 he is talking about. If you adopt his language, then
17 the person who acts in good faith at the request of the
18 police officer is going to be completely immune. They
19 grab the wrong property. They're not going to be
20 liable if they damage it. You've got the problem of
21 reasonable mistake of fact not being a defense to
22 conversion or trespass lurking in this whole thing.

23 What they were trying to do was provide some
24 type of partial immunity to the person who acted in
25 good faith and reasonably. The motion was called

1 quicker than we could get on our feet to discuss it.
2 And I think the committee ought to look at this and see
3 if there is some way to work all that out without us
4 trying to draft it from the floor.

5 CHAIRMAN LEINENWEBER: Commissioner Bonfield,
6 do you accept his suggestion?

7 COMMISSIONER BONFIELD: No, because it seems
8 to me, I'd like a resolution of this issue, and I have
9 no idea -- what is the committee's position on this
10 question?

11 COMMISSIONER DAVID A. GIBSON (Vermont): The
12 position of the committee, given the earlier vote, is
13 to strike the whole thing.

14 COMMISSIONER BONFIELD: So that there would be
15 no limitation or no situation where you would, in
16 effect, exclude from this limitation where the -- there
17 was collusion between the law enforcement officer and
18 the private citizen?

19 COMMISSIONER GIBSON: The position that the
20 committee might take -- and I can't speak for all of
21 the members because we haven't discussed it,
22 obviously -- is that section (g) may do more mischief
23 than good as presently constituted, and therefore
24 subsection (g) would be deleted entirely and allow the
25 courts to handle these problems under its usual ability

1 to do so.

2 COMMISSIONER BONFIELD: Oh. That, of course,
3 would make -- if you're talking about deleting the
4 whole section, I wouldn't be standing here.

5 Is there some feeling in the committee that
6 that is what is going to happen?

7 COMMISSIONER GIBSON: On subsection (g), yes.

8 COMMISSIONER BONFIELD: Well, okay. I
9 withdraw my motion.

10 CHAIRMAN LEINENWEBER: Any further discussion
11 on this section? Yes, sir.

12 COMMISSIONER DAVID D. BIKLEN (Connecticut):
13 That includes the last sentence of (g)?

14 [Laughter]

15 CHAIRMAN LEINENWEBER: The whole section is
16 going to be dropped.

17 COMMISSIONER BIKLEN: I know the committee
18 explained the application of (i) again. Would you do
19 that, please, again for me.

20 COMMISSIONER GIBSON: I didn't quite hear what
21 you said.

22 COMMISSIONER BIKLEN: Would you explain the
23 application of subsection (i) again, please.

24 COMMISSIONER GIBSON: Yes. (i) applies to the
25 situation where property may be seized

1 unconstitutionally.

2 We wanted to make it clear that in that
3 situation, a court would still have the authority to
4 deal with the property. If it were contraband,
5 obviously it wouldn't go back to anyone. If it were a
6 piece of property such as a car or some other article
7 of personal property, then it would be returned to
8 whomever it was seized from. But we wanted to make it
9 clear that the court would have the authority to deal
10 with that property.

11 COMMISSIONER BIKLEN: Thank you.

12 CHAIRMAN LEINENWEBER: Further discussion?

13 COMMISSIONER PETER F. LANGROCK (Vermont): I
14 am just curious. In section (f), you have the
15 requirement, estimate the value of property seized.
16 Why is that?

17 COMMISSIONER GIBSON: Because later on there
18 may be a situation of posting some bond or other
19 security of the value of the property seized, in order
20 for it to be either released or sold or disposed of.

21 COMMISSIONER LANGROCK: It just seems to me --
22 I will tell you where my fear in that is -- that if
23 you're talking about contraband, we are talking about,
24 I take it, putting a price on the amount of drug
25 seized. Is that what we are talking about?

1 COMMISSIONER GIBSON: No, we are not talking
2 about contraband particularly there.

3 COMMISSIONER LANGROCK: But any time you
4 seized drugs, you're then required to put a value on it
5 under this section?

6 COMMISSIONER GIBSON: Not necessarily. If
7 it's contraband -- the way it's drafted, perhaps so,
8 but that is not really the type of thing that we are
9 intending to get at.

10 COMMISSIONER LANGROCK: I had hoped that
11 wasn't the case, because then you get into the question
12 of talking street level, wholesale level.

13 The other thing you have, if you seize some
14 property, like a piece of art, then you have to have --
15 putting a duty to get an appraisal, or is the cop going
16 to say how much a Van Gogh is worth? You know, I just
17 don't know the benefit.

18 When you get around to arguing about it --
19 bonds, you can deal with it there. But it seems to me
20 that that is a requirement which is a burden upon a law
21 enforcement agency which makes no particular value at
22 this point, and I suggest you consider striking it.

23 CHAIRMAN LEINENWEBER: Commissioner.

24 COMMISSIONER DAVID D. BIKLEN (Connecticut):
25 I'd like, under (i) again on Page 113, could the

1 committee reconsider or consider redrafting (i) to say
2 essentially what the chairman indicated that the intent
3 of that writing was.

4 COMMISSIONER GIBSON: I'd rather just include
5 that in the comment.

6 COMMISSIONER BIKLEN: Well . . .

7 COMMISSIONER GIBSON: The reason why is that
8 we have gotten into some debates within the committee
9 as to just, you know, should -- even though it's been
10 seized unconstitutionally, if in fact it was subject to
11 forfeiture, if done properly, what should happen to it.
12 I don't want to open up that can of worms in trying to
13 state it otherwise than as stated right here. I'd
14 rather deal with it in the comment.

15 CHAIRMAN LEINENWEBER: Anything further on
16 this section?

17 COMMISSIONER BIKLEN: I am not completely
18 happy with that. I am not sure I fully understand the
19 full ramifications of your answer. But I would like to
20 suggest that the committee revisit that and draft it in
21 a way so we understand what it is that the committee
22 intends. And I am not sure a comment is adequate.

23 CHAIRMAN LEINENWEBER: Anything further on
24 this section? Yes, sir.

25 COMMISSIONER W. STEPHEN WILBORN (Kentucky):

1 Using the example that you mentioned, why wouldn't just
2 the word "contraband" be satisfactory there? Then it
3 would say, "the jurisdiction of a court over contraband
4 is not affected by seizure."

5 COMMISSIONER JAMES A. YATES (New York): Mr.
6 Chairman, if I could help on that. I guess the law is
7 pretty well settled that if the property was seized
8 unconstitutionally, it's not admissible as evidence in
9 a forfeiture proceeding, and it also is not subject of
10 forfeiture itself. So, that property is not going to
11 be forfeited and it can't be introduced as evidence.

12 So then, the question is left, does that mean,
13 if that was the jurisdictional basis for the
14 proceeding, is the entire proceeding out?

15 I guess the purpose of this language, which I
16 don't have a problem with, is: No. If there are other
17 assets, substituted assets or other assets that the
18 court -- that the claiming authority came into
19 possession of later on, the proceeding can continue.

20 Just to say that the suppression of the
21 evidence for evidentiary purposes will not destroy the
22 jurisdictional basis, I don't think is really a bad
23 result, and I think that is what was intended here.

24 COMMISSIONER WILBORN: It may be what was
25 intended. It was not the example that was used.

1 Because the words "using contraband" there would have
2 sufficed, I would have thought.

3 Thank you.

4 CHAIRMAN LEINENWEBER: Read Paragraph 507,
5 please.

6 COMMISSIONER PETER F. LANGROCK (Vermont):
7 Before we do, just one question. Is the committee
8 going to look at (f), on the valuation, or is that --
9 if you'll take a look at it, I don't want to make a
10 motion at this point.

11 COMMISSIONER REID C. PIXLER (Colorado): I
12 will explain to you something about it, Peter, what
13 advantages there are. But there is a real advantage to
14 doing this early on with regard to loss of claims or
15 damage or figuring out who -- the value of various
16 claims -- a number of things that are important as far
17 as value on a lot of property.

18 COMMISSIONER LANGROCK: There are also some
19 disadvantages and disincentives that the prosecution
20 value, valuation -- there is a tendency to make it
21 high -- for purpose of reporting to the legislature,
22 for purpose of high bonds later on, and what have you.

23 I really think -- it's not a major policy
24 issue. If you'll take a look at it, fine. If not, I
25 will be happy to make a motion right now. I will

1 either make it now or later. But I will give you a
2 chance to look at it first. Whichever way you want to
3 go. Are you going to take a look at it?

4 No? Okay. I will make a motion.

5 CHAIRMAN LEINENWEBER: They're going to look
6 at it. Anything further?

7 [Laughter]

8 CHAIRMAN LEINENWEBER: If not, read 507,
9 please.

10 COMMISSIONER RICHARD L. BRAUN (North
11 Carolina): I now have the honor of introducing the
12 next dispute, Section 507.

13 "SECTION 507. COMMENCEMENT OF FORFEITURE
14 PROCEEDINGS.

15 "(a) Forfeiture proceedings may be initiated
16 only by providing notice of pending forfeiture or by
17 filing a judicial forfeiture proceeding."

18 Incidentally, this is a very long section, so
19 be patient.

20 "(b) If the state fails to initiate
21 forfeiture proceedings against property seized for
22 forfeiture by notice of pending forfeiture within [90]
23 days after its seizure for forfeiture, or fails to
24 pursue forfeiture of the property upon which a timely
25 claim has been properly filed by filing a judicial

1 forfeiture proceeding within [30] days after the filing
2 of a timely claim that includes a request for filing a
3 judicial forfeiture proceeding or, with respect to a
4 claim that does not include such a request, within [90]
5 days after notice of pending forfeiture, the property
6 or the interest asserted by the claimant must be
7 released from its seizure for forfeiture upon the
8 request of an owner or interest holder. The state and
9 all claimants who have filed a timely claim may agree
10 to extend the time for filing a judicial forfeiture
11 proceeding. For good cause shown, the court may extend
12 the time for giving notice of pending forfeiture or
13 filing a judicial forfeiture proceeding.

14 "(c) Whenever notice of pending forfeiture
15 [or service of an in rem complaint] is required under
16 this [Article], a copy of the notice [or service]" --

17 PRESIDENT BUGGE: Mr. Chairman, point of
18 order. Mr. Chairman, I have just had a little
19 discussion with the chairman of the Drafting Committee,
20 and in view of the hour and the progress made on
21 Article 5 of this act, I would suggest, and with leave
22 of the House, that the committee proceed to read
23 Articles 6 and 7, and then come back after being able
24 to meet together with their advisers tomorrow at some
25 point yet to be determined, with a recommendation on how

1 to proceed on Article 5.

2 The Article 5 has been substantially amended
3 on the floor, and further reading and amendment at this
4 time I think is not going to be productive. And
5 therefore, I suggest, Mr. Chairman, that with the
6 consent of the House, that we proceed instead to read
7 Articles 6 and 7.

8 CHAIRMAN LEINENWEBER: Do we have the consent
9 of the House? Seeing no objection, we will now proceed
10 to read 605.

11 COMMISSIONER DAVID A. GIBSON (Vermont):
12 Before we commence the reading of Article 6, I would
13 just point out, as I stated this morning, Sections 601
14 through 604 were read as Sections 501 through 504 last
15 year. There has been, I believe, no change whatsoever
16 from the language contained in Sections 601 through 604
17 at this time.

18 So, we will move directly to Section 605,
19 complete that, and then go into Article 7 after we
20 complete Sections 605 through 607.

21 I see the commissioner who's to be reading
22 Article 6 approaching the podium.

23 COMMISSIONER JAMES A. YATES (New York): Sorry
24 for the delay.

25 "SECTION 605. BURDEN OF PRODUCING EVIDENCE;

1 LIABILITIES.

2 "(a) Except as provided in Section 505(c), it
3 is not necessary for the state to negate any exemption
4 or exception in this [Act] in any complaint,
5 information, indictment, or other pleading or in any
6 trial, hearing, or other proceeding under this [Act].
7 The burden of producing evidence of any exemption or
8 exception is upon the person claiming it.

9 "(b) No person is presumed to be the holder
10 of an appropriate registration or order form issued
11 under this [Act]. A person who claims to be the holder
12 of the registration or order form has the burden of
13 producing evidence with respect to the registration or
14 order form.

15 "(c) No civil or criminal liability is
16 imposed by this [Act] upon any authorized state, county
17 or municipal officer, lawfully engaged in the
18 enforcement of this [Act]."

19 CHAIRMAN LEINENWEBER: Is there discussion?

20 COMMISSIONER ROGER C. HENDERSON (Arizona):

21 Just a quick point. In your deliberations about
22 505(g), this business about good faith, you might look
23 at taking care of that whole matter under (c) of 605.

24 CHAIRMAN LEINENWEBER: Further discussion on
25 605?

1 COMMISSIONER RAYMOND P. PEPE (Pennsylvania):

2 In 605(c), I would suggest broadening the immunity
3 beyond mere enforcement, because, of course, there are
4 lots of administrative duties involved in maintaining
5 the schedules provided by this act.

6 I appreciate why the committee changed the
7 wording the way it did. The committee might want to
8 consider revising it to state that liability is not
9 imposed upon officers engaged in the lawful performance
10 of duties under this act, because the duties may very
11 well be administrative in addition to enforcement
12 duties.

13 COMMISSIONER DAVID A. GIBSON (Vermont): I
14 don't think we have any problem with that language. We
15 thought that what we were doing would extend to the
16 civil action types of inspections and so forth in any
17 event.

18 CHAIRMAN LEINENWEBER: Further discussion?
19 Read 606, please.

20 COMMISSIONER JAMES A. YATES (New York):

21 "SECTION 606. JUDICIAL REVIEW. All final
22 determinations, findings, and conclusions of the
23 [appropriate person or agency] under this [Act] are
24 subject to judicial review pursuant to [the State
25 Administrative Procedure Act]."

1 CHAIRMAN LEINENWEBER: Is there discussion of
2 this section? Proceed to read 607, please.

3 COMMISSIONER YATES: 607.

4 "SECTION 607. EDUCATION AND RESEARCH.

5 "(a) The [appropriate person or agency] shall
6 carry out educational programs designed to prevent and
7 deter misuse and abuse of controlled substances. In
8 connection with these programs, the [appropriate person
9 or agency] may:

10 "(1) promote better recognition of the
11 problems of misuse and abuse of controlled substances
12 within the regulated industry and among interested
13 groups and organizations;

14 "(2) assist the regulated industry and
15 interested groups and organizations in contributing to
16 the reduction of misuse and abuse of controlled
17 substances;

18 "(3) consult with interested groups and
19 organizations to aid them in solving administrative and
20 organizational problems;

21 "(4) evaluate procedures, projects,
22 techniques, and controls conducted or proposed as part
23 of educational programs on misuse and abuse of
24 controlled substances;

25 "(5) disseminate the results of research on

1 misuse and abuse of controlled substances to promote a
2 better public understanding of what problems exist and
3 what can be done to combat them; and

4 "(6) assist in the education and training of
5 state and local law enforcement officials in their
6 efforts to control misuse and abuse of controlled
7 substances.

8 "(b) The [appropriate person or agency] shall
9 encourage research on misuse and abuse of controlled
10 substances. In connection with the research, and in
11 furtherance of the enforcement of this [Act], the
12 [appropriate person or agency] may:

13 "(1) establish methods to assess accurately
14 the effects of controlled substances and identify and
15 characterize those with potential for abuse;

16 "(2) make studies and undertake programs of
17 research to:

18 "(i) develop new or improved approaches,
19 techniques, systems, equipment, and devices to
20 strengthen the enforcement of this [Act];

21 "(ii) determine patterns of misuse and abuse
22 of controlled substances and the social effects
23 thereof; and

24 "(iii) improve methods for preventing,
25 predicting, understanding, and dealing with the misuse

1 and abuse of controlled substances; and

2 "(3) enter into contracts with public
3 agencies, institutions of higher education, and private
4 organizations or individuals for the purpose of
5 conducting research, demonstrations, or special
6 projects which bear directly on misuse and abuse of
7 controlled substances.

8 "(c) The [appropriate person or agency] may
9 enter into contracts for educational and research
10 activities without performance bonds and without regard
11 to [appropriate code section].

12 "(d) The [appropriate person or agency] may
13 authorize persons engaged in research on the use and
14 effects of controlled substances to withhold the names
15 and other identifying characteristics of individuals
16 who are the subjects of the research. Persons who
17 obtain this authorization are not compelled in any
18 civil, criminal, administrative, legislative, or other
19 proceeding to identify the individuals who are the
20 subjects of research for which the authorization was
21 obtained.

22 "(e) The [appropriate person or agency] may
23 authorize the possession and distribution of controlled
24 substances by persons engaged in research. Persons who
25 obtain this authorization are exempt from state

1 proseoution for possession and distribution of
2 controlled substances to the extent of the
3 authorization."

4 CHAIRMAN LEINENWEBER: Commissioner Hogan.

5 COMMISSIONER WILLIAM E. HOGAN (New York): I
6 am all for education and research, obviously. But I do
7 have a question about 605. With the Chair's
8 permission, I would like to note that the exception for
9 505(c) in 605(a) must now be enlarged a little in light
10 of what we did to the burden of proof when we were
11 talking about 505.

12 CHAIRMAN LEINENWEBER: They agreed.

13 On 607, discussion.

14 COMMISSIONER W. JACKSON WILLOUGHBY
15 (California): The yellow book, in the appendix, has a
16 list, and the heading is, "avoid the use of the
17 following redundant couplets." It goes through and
18 lists all kinds of them.

19 In Section 607, it seems to me that "misuse"
20 and "abuse" is a redundant couplet. Why say "misuse
21 and abuse"? Why not just say "abuse"? Isn't that what
22 we are really talking about?

23 COMMISSIONER DAVID A. GIBSON (Vermont): The
24 only response I can give you is that that is the way it
25 was in the original act, and we didn't change it.

1 COMMISSIONER WILLOUGHBY: Fabulous. Well, if
2 that is the way it was, we certainly wouldn't want to
3 touch it.

4 [Laughter]

5 CHAIRMAN LEINENWEBER: Any further discussion?
6 If not, proceed to read Article 7.

7 COMMISSIONER MILLARD H. RUUD (Texas): Mr.
8 Chairman, just an inquiry. On Page 162, Lines 3 and 4,
9 "and without regard to." What is the appropriate code
10 section? Does it have to do with performance bonds
11 or -- Page 162, Lines 3 and 4. There is a phrase, "and
12 without regard to," and in brackets, "appropriate code
13 section."

14 What kind of code section is supposed to be
15 put in there? Are they the code provisions on
16 performance bonds? If that is it, you have already
17 said, and you wouldn't say it quite this way.

18 I think we ought to be given some instructions
19 on what is supposed to be cited there. Do you mean
20 competitive bidding?

21 COMMISSIONER GIBSON: Commissioner, again,
22 this is language that existed in the act as adopted
23 back 20 years ago, and we didn't touch it. I think you
24 may be correct, that it would --

25 COMMISSIONER RUUD: The fact that we made a

1 mistake 20 years ago doesn't mean we shouldn't --

2 COMMISSIONER GIBSON: I did not mean to
3 suggest that we shouldn't. I am just saying that the
4 committee didn't look at it. We don't know.

5 COMMISSIONER RUUD: If you would, please.

6 CHAIRMAN LEINENWEBER: Commissioner.

7 COMMISSIONER ROBERT J. TENNESSEN (Minnesota):
8 Page 158, paragraph (c). Simply ask if you intend to
9 broaden the immunity of the law enforcement people by
10 those changes.

11 COMMISSIONER GIBSON: The committee did not
12 intend any substantial change to the concept of
13 immunity from liability. It did make it clear that it
14 is civil and criminal liability that would be involved
15 here, and also that it applies in connection with --
16 and I think there was earlier discussion on it -- that
17 it would apply to both law enforcement officers engaged
18 in enforcing the act as well as any administrative
19 inspectors or whatever.

20 COMMISSIONER TENNESSEN: Mr. Chairman, is
21 lawfully engaged meant to be a different standard than
22 lawful performance of duties?

23 COMMISSIONER GIBSON: No.

24 COMMISSIONER TENNESSEN: Thank you.

25 CHAIRMAN LEINENWEBER: Further discussion?

1 COMMISSIONER JAMES A. YATES (New York):

2 Actually, I think Commissioner Tennessen may have made
3 a good observation that I hadn't noticed before. Many
4 states, including the New York, have both geographic
5 and temporal limitations upon the exercise of duties by
6 different peace officers, so that someone who was off
7 duty away from his geographical post or his temporal
8 assignment, or maybe even some other special duties
9 that had been assigned to him, could now claim he was
10 acting in enforcement of the act, even though it was
11 beyond the scope of his duties, and he would pick up
12 the extra immunity from that section.

13 I didn't think of it until you raised it, but
14 I guess that wasn't intended.

15 CHAIRMAN LEINENWEBER: Any further discussion?
16 Read Section 701, please.

17 COMMISSIONER JAMES A. YATES (New York):

18 "Article VII

19 "Section 701. PENDING PROCEEDINGS.

20 "(a) Prosecution for any violation of law
21 occurring before the effective date of this [Act] is
22 not affected or abated by this [Act]. If the offense
23 being prosecuted is similar to one set out in Article
24 IV of this [Act], then the penalties under Article IV
25 apply if they are less than those under prior law.

1 "(b) Civil seizures or forfeitures and
2 injunctive proceedings commenced before the effective
3 date of this [Act] are not affected by this [Act].

4 "(c) All administrative proceedings pending
5 under previous laws that are superseded by this [Act]
6 must be continued and brought to a final determination
7 in accord with the laws and rules in effect before the
8 effective date of this [Act]. Any substance controlled
9 under prior law but which is not listed in Section 204,
10 206, 208, 210, or 212 is automatically controlled
11 without further proceedings and must be included in the
12 appropriate schedule.

13 "(d) The [appropriate person or agency] shall
14 initially permit persons to register who own or operate
15 any establishment engaged in the manufacture,
16 distribution, dispensing of any controlled substance
17 prior to the effective date of this [Act] and who are
18 registered or licensed by the state.

19 "(e) This [Act] applies to violations of law,
20 seizures and forfeiture, injunctive proceedings,
21 administrative proceedings, and investigations which
22 occur following its effective date."

23 CHAIRMAN LEINENWEBER: Discussion on Section
24 701. Proceed to read Section 702.

25 COMMISSIONER YATES: 702.

1 "SECTION 702. CONTINUATION OF RULES;
2 APPLICATION TO EXISTING RELATIONSHIPS. Any orders and
3 rules adopted under any law affected by this [Act] and
4 in effect on the effective date of this [Act] and not
5 in conflict with this [Act] continue in effect until
6 modified, superseded, or repealed. Rights and duties
7 that matured, penalties that were incurred, and
8 proceedings that were begun before the effective date
9 of this [Act] are not affected by Section 708."

10 CHAIRMAN LEINENWEBER: Is there discussion on
11 Section 702? Proceed to read Section 703.

12 COMMISSIONER YATES: 703.

13 "SECTION 703. CONTINUING CRIMINAL ENTERPRISE;
14 CIVIL ACTION. The [appropriate authority] may maintain
15 a civil action against any person or persons who
16 violate Section 411 to obtain a judgment for joint and
17 several damages in an amount equal to three times the
18 proceeds acquired by all persons involved in the
19 enterprise or by reason of conduct in furtherance of
20 the enterprise, together with costs incurred for
21 resources and personnel used in the investigation and
22 prosecution of both criminal and civil proceedings.
23 The standard of proof in actions brought under this
24 subsection is a preponderance of the evidence."

25 CHAIRMAN LEINENWEBER: Commissioner Langrock.

1 COMMISSIONER PETER F. LANGROCK (Vermont): Why
2 703? Aren't there enough tools out there without this?
3 I mean the question seriously.

4 COMMISSIONER DAVID A. GIBSON (Vermont): The
5 short answer is "no." The reason that this appears in
6 this particular location, because it had previously
7 been in Article 4, was that, it was quite properly
8 pointed out, it really wasn't a criminal penalty
9 section, so we lifted the language that had been
10 reviewed previously by the conference and put it into
11 Article 7, thinking this was a more appropriate place
12 for this type of a provision.

13 COMMISSIONER LANGROCK: Let me ask another
14 question. If I am not mistaken, take anybody in a drug
15 transaction, a minor street dealer who deals marijuana
16 for his own uses or whatever the case, small amounts.
17 If I understand it correctly, you can go down the chain
18 to everybody he deals with and you can go up the
19 chain -- and if you are talking about cocaine, you can
20 probably go all the way to the cartels in Colombia --
21 and then you take the billions of dollars that are
22 involved, multiply it by three, and add those on, and
23 anybody who is involved in this act really now is
24 involved in a potential civil forfeiture or civil
25 judgment, which is far greater than anybody -- than

1 they could possibly owe.

2 So, if you are saying that civilly you can get
3 everything from everybody no matter how small they are,
4 as long as they're in a chain where there is a lot of
5 money --

6 COMMISSIONER GIBSON: No. That is not what
7 this provision says. The provision here applies only
8 to those who can be convicted of a violation of 411,
9 and those have to be the so-called kingpins.

10 COMMISSIONER LANGROCK: If I understand it
11 correctly, if there are five people who sit together in
12 a room and they divide up a pound of pot, and maybe do
13 it on two occasions, they can now be kingpins, can't
14 they?

15 COMMISSIONER GIBSON: Let me look at the
16 language. I think that is an overreading of the
17 provisions of 411. The person has to occupy a position
18 of organizer. There has to be derivation of
19 substantial income or resources from the action. It's
20 part of a continuing series of two or more violations
21 in concert with five more, and that person to be
22 charged has to be in the position of organizer,
23 supervisor, whatever.

24 Also, I think in your example, even if that
25 were to come under it, obviously there wasn't a great

1 deal of money to be made from it.

2 COMMISSIONER LANGROCK: Maybe I overstated my
3 case a little bit, but let's take somebody who is a
4 street dealer of cocaine and he is one of five or six
5 people in this situation. As I understand it, he,
6 seriously, could be prosecuted under 411, if he did it
7 on -- substantial amount of income. I don't know what
8 that is. Is \$1,000 a substantial amount of income? If
9 you do that, once you get into the chain, don't you get
10 all the money up the chain as well as down the chain as
11 it is presently drafted?

12 COMMISSIONER GIBSON: If the person qualifies
13 as being a violator of Section 411, then you can get
14 damages for proceeds acquired by all persons. That is
15 correct.

16 COMMISSIONER LANGROCK: So, any time you've
17 got cocaine that is traced to Colombia, any person who
18 falls under 411, cocaine, is subject to multi-billion
19 dollar judgments.

20 COMMISSIONER GIBSON: No. It is only the one
21 who is convictable under 411.

22 COMMISSIONER LANGROCK: Anybody who is
23 convicted under 411 is subject to a multi-billion
24 dollar judgment.

25 COMMISSIONER GIBSON: That is a possibility,

1 yes.

2 COMMISSIONER LANGROCK: Why don't we simply
3 put a statute in there, if you're convicted under 411,
4 all your property may be forfeited?

5 COMMISSIONER GIBSON: We don't think that
6 would satisfy due process.

7 COMMISSIONER LANGROCK: But isn't that what we
8 are saying here? I move we strike 703.

9 CHAIRMAN LEINENWEBER: All right. There is a
10 motion to strike Section 703. The committee, I take
11 it, opposes that, is that correct?

12 Further discussion?

13 COMMISSIONER REID C. PIXLER (Colorado): What
14 you are looking at is an organization, and those
15 proceeds of that organization should be forfeitable.
16 If somebody has acquired that kind of wealth because
17 they are a kingpin in the activities that have
18 generated that wealth, and they're controlling it and
19 organizing it, those assets need to be forfeited to
20 destroy the organization that is operating to introduce
21 those drugs.

22 This is a procedure that figures the penalty,
23 finds a way to calculate it. Logically it's related to
24 the activity in 411. The damage is determined to be
25 three times the amount. And it's an effort to

1 dismantle that organization. It's a profoundly heavy
2 tool. It is consistent with other law.

3 Basically I oppose your motion because this is
4 a real major vehicle to be able to undo organized drug
5 trafficking organizations. They may go to Colombia or
6 wherever, but they're limited to the folks that are
7 involved in the 411 activity that can be identified and
8 convicted.

9 CHAIRMAN LEINENWEBER: Further discussion on
10 the motion? If not, you may close.

11 COMMISSIONER LANGROCK: I hear what you say,
12 but it seems to me that you can forfeit property if you
13 can prove that it's drug-connected. So, what you're
14 saying here is, this person may have a lot of property,
15 and we can't prove it's drug-connected. If we could,
16 we could forfeit. We could take every nickel he has
17 that is drug-related, traced back, whatever the case
18 may be. But because we can't prove it, we are going to
19 give a remedy that allows you to take everything
20 without any proof that it's drug-related, because we
21 have a civil penalty which deals not only with what he
22 has, but which the entire line has, which goes all the
23 way to Colombia.

24 It seems to me that that is such a powerful
25 tool, it's not really a necessary tool, just one

1 that -- it's Westmoreland asking for more troops. We
2 are going to get deeper into this.

3 CHAIRMAN LEINENWEBER: All right. There is a
4 motion to strike Section 703. All those in favor,
5 signify by saying "aye."

6 Opposed, by "nay."

7 The "noes" have it. The motion fails.

8 Further discussion on 703? If not, proceed to
9 Section 704.

10 COMMISSIONER JAMES A. YATES (New York): I
11 have a comment on 703. It seems to me that the only
12 reason you need to create a civil action in 703, as
13 opposed to making this a penalty that is imposed upon
14 conviction -- you know, we have fines that are imposed
15 on conviction over in the penal section -- is because
16 you want to allow the one situation where a person is
17 not convicted of participating in a continuing criminal
18 enterprise.

19 That would be the only reason for having it
20 over here. I think rather than just eliminating
21 Section 703, we ought to move it over to the penal
22 section and apply this penalty for people who are
23 convicted, or, in the alternative, amend on Line 3,
24 where it says "persons who violate Section 711," to say
25 "persons who are convicted of Section 411."

1 CHAIRMAN LEINENWEBER: Anything further on
2 Section 403?

3 COMMISSIONER YATES: I want to know if anyone
4 wants to make that motion.

5 COMMISSIONER SHAUN P. HAAS (Wisconsin): I got
6 up -- I think I got up in time, but you didn't call on
7 me. I just want to make one comment on 703 and the
8 issue that is raised by Commissioner Langrock and is
9 being talked about now.

10 I am concerned that sometimes these issues are
11 raised -- Commissioner Langrock described a particular
12 situation. He is concerned about a possible abuse. He
13 recognizes the committee's concerns, but he says it
14 could apply perhaps in this kind of circumstance.
15 Can't we do something about it?

16 The committee never responds to those
17 particular concerns. I would like to see the committee
18 respond to those concerns. If there is overbreadth in
19 a provision, if it could apply in the kind of
20 circumstance that Commissioner Langrock raises and so
21 on, I would like to hear the committee say: Well, yes,
22 we understand that point. We will modify it to make
23 sure that it doesn't apply like that because we didn't
24 intend that.

25 COMMISSIONER REID C. PIXLER (Colorado): I

1 would like to address that directly. Basically what
2 you're doing is intentionally creating loopholes in
3 this act. The purpose of the -- well, sorry that you
4 disagree with me. But several of the things that were
5 done earlier today will be exploited by the traffickers
6 to their benefit.

7 We are all motivated. I am the last person
8 that would want to forfeit somebody's property that
9 didn't deserve to be forfeited. That is the honest
10 truth. The reality of it is, when you identify
11 forfeiture assets and then try to draw a law to forfeit
12 these assets, then you create a whole collection of
13 little exceptions. Those are the exceptions through
14 which the drug traffickers will attempt to drive a
15 truck.

16 Basically, these issues have been debated by
17 the committee. If you see a resistance from the
18 committee, it's because we have been through this for
19 three, four years, debating these things, and came up
20 with the very best thing we could provide to you.

21 It's being criticized and whittled down in
22 terms of creating what amounts to loopholes that I
23 don't believe were necessary in the act.

24 CHAIRMAN LEINENWEBER: Commissioner, on 703.

25 COMMISSIONER NEAL OSSEN (Connecticut): Now,

1 do I take it that in addition to the remedy under 703,
2 state prosecutors would have RICO-type actions as well,
3 so that if a person violates Section 411, he may be
4 subject to not only a civil action under 703, but if
5 there is state RICO-type statutes, that that would
6 apply as well?

7 COMMISSIONER GIBSON: I would guess that if
8 the particular state statute under racketeering would
9 include this type of action, then you'd have your
10 choice of going under that as well.

11 COMMISSIONER OSSEN: I don't practice criminal
12 law, and I don't know even where the criminal court in
13 Connecticut is. But I am sure there are people here
14 who are familiar with their state RICO statutes.
15 Certainly the people from the Justice Department ought
16 to know whether or not this is now two civil actions
17 that are available.

18 I don't get an answer?

19 COMMISSIONER JAMES A. YATES (New York): Mr.
20 Chairman. I know that in New York we took care to
21 create an election of remedies paragraph so that when
22 we have both RICO and drug offenses and forfeiture and
23 fines for triple the amount -- because we also allow a
24 fine for double or triple the amount of the gain in any
25 drug transaction -- that we put in a paragraph talking

1 about election of remedies.

2 I guess I haven't seen one here, and that is
3 what you are really talking about. You asked about
4 other states. From the little I know about other
5 states, I don't think that many states do have an
6 election of remedies provision.

7 COMMISSIONER OSSEN: So, I take it that it is
8 conceivable that you can bring an action under 703, you
9 can lose, now you turn around and bring a RICO action?

10 COMMISSIONER YATES: Yes.

11 COMMISSIONER OSSEN: Mr. Chairman, I am going
12 to move that the committee put in an election of
13 remedies. Either you go under RICO, or whatever -- my
14 state calls it COBRA -- or you do 703. But there comes
15 a time when we've got to stop burdening the courts with
16 these actions.

17 And in addition to which, after that motion, I
18 want to go back to the one about conviction.

19 CHAIRMAN LEINENWEBER: You made a motion that
20 the committee draft a new section entitled "election of
21 remedies."

22 COMMISSIONER OSSEN: The substance of which
23 will be that a state may either proceed under 703 or
24 its RICO statute. If they don't have a RICO statute,
25 then they're under 703.

1 CHAIRMAN LEINENWEBER: Does the committee
2 understand the gist of what he is requesting? All
3 right. Any discussion on that? Does the committee
4 wish to take a position on it? The committee does not
5 take a position on it.

6 All thcse in favor, signify by saying "aye."

7 All those opposed.

8 The "noes" appear to have it. The motion
9 fails.

10 Commissioner.

11 COMMISSIONER ROGER C. HENDERSON (Arizona):
12 Point of inquiry. Do you mean in Line 3, when you use
13 the word "violate" in Section 703 to mean person or
14 persons who are actually convicted?

15 The thing that bothers me about this section,
16 you're talking about joint and several liability, and I
17 am wondering who those people are and whether they're
18 all going to be before the court. If they're not
19 before the court, I don't think in this country we hold
20 people civilly liable if they haven't had their day in
21 court, which is a common problem in joint and several
22 liability situations.

23 I have no problem with destroying the
24 enterprise, but this thing is fundmentally flawed if
25 you're thinking about reaching out and getting hold of

1 people who are not actually before the court and who
2 are convicted.

3 COMMISSIONER DAVID A. GIBSON (Vermont): I
4 don't think it quite works the way you see this
5 language reaching. In order to get a judgment against
6 any person, they would obviously have their day in
7 court. And they would be accused of having violated
8 Section 411 whether or not they had been convicted of
9 that criminal violation.

10 If the proof by preponderance of the evidence
11 indicated that the person or persons against whom the
12 complaint has been filed did in fact violate Section
13 411 and that they acquired proceeds, and others also
14 acquired proceeds, of, say, \$100,000, then the judgment
15 would be entered against those persons who were before
16 the court for, say, \$300,000, as three times the amount
17 of the proceeds.

18 That does not mean that the court can now
19 issue an order as to other persons who are not parties
20 to the case, that they have to turn over assets that
21 may be derived from drug transactions. It simply means
22 the persons against whom the judgment has been made in
23 that court have to pay that sum from whatever assets
24 they may have.

25 COMMISSIONER FRED H. MILLER (Oklahoma): There

1 is a long history and experience with civil penalties
2 in various other contexts, and it seems to me that that
3 experience teaches us that flat rules like this don't
4 work very well in a number of cases.

5 I am wondering whether the committee would be
6 receptive to changing the cast of this to be more
7 consistent with that experience, which would mean in
8 Line 5, you would have something like: In an amount up
9 to -- and then I am not concerned whether you have
10 three or greater multiple times the proceeds -- as set
11 in the discretion of the court, and provide some
12 criteria for the court to use its discretion, such as
13 the grievousness of the offense, the number of repeats,
14 et cetera.

15 This, I think, would allow a deterrent
16 sanction in an egregious case. We rely on the court's
17 discretion to determine that. But it also gives the
18 court some flexibility in a case that might not be that
19 bad.

20 COMMISSIONER PATRICK C. GUILLOT (Texas): I am
21 not sure I know what history you're talking about. I
22 can speak for the State of Texas and my knowledge of
23 the antitrust laws, that treble damages have been
24 granted under the Sherman Antitrust Act for a long,
25 long time, The Robinson-Patman Act. The Deceptive

1 Trade Practices Act has treble damages in it. RICO has
2 treble damages. I don't know why we need to say "up to
3 three or four times." It may be that it would be good
4 to hit somebody with ten times the damages. But I
5 don't know exactly what the problem is in having it set
6 at three times.

7 COMMISSIONER MILLER: Because what you are
8 doing is leading to the situation that Commissioner
9 Langrock explained, and the experience I am focusing
10 on, for example, is the civil penalty under Truth in
11 Lending, the civil penalty under Equal Credit
12 Opportunity, the civil penalty that was provided in the
13 conference product called the Uniform Consumer Credit
14 Code.

15 All of these had civil penalties which allowed
16 the court to determine, based on factors, the degree of
17 the sanction. The sanction could be very severe or it
18 could be relatively light, depending on what the
19 conduct was. This is a flat standard that seems to me
20 to be inadvisable as opposed to giving the court that
21 discretion.

22 COMMISSIONER GIBSON: The purpose of this
23 provision is to try to hit the criminal in the pocket
24 book, where it hurts. It's not a civil penalty type
25 action. It's a civil damages assertion.

1 Frankly, I don't know the difference between a
2 civil penalty and a fine in a criminal case. But be
3 that as it may, it's clearly designed to hit the guy
4 who has been making money in the drug trade where it
5 hurts.

6 COMMISSIONER MILLER: Well, seeing no
7 receptiveness on the part of the committee, I would
8 like to move in Line 5 that the language be changed,
9 "in an amount up to" -- I will leave the committee's
10 discretion to fill in the blank, whether it ought to be
11 three or some other period, or some other multiple --
12 "times the proceeds," and put it in the discretion of
13 the court and provide appropriate guidelines for the
14 court to use in exercising that discretion. You can
15 look for models in, as I say, the conference enactment
16 of the Uniform Consumer Credit Code, the Truth in
17 Lending provisions, Equal Credit Opportunity
18 provisions. I will be glad to supply those to the
19 committee if you can't find them.

20 CHAIRMAN LEINENWEBER: There is a motion on
21 the floor to amend Section 703 to read as follows, and
22 starting on Line 5: "Damages in an amount up to"
23 bracket, leaving blank, "times the proceeds acquired by
24 all persons involved in the enterprise, in the
25 discretion of the court."

1 And the committee is then directed to proceed
2 to draft criteria for the exercise of discretion.

3 Did I accurately state your motion, sir?

4 COMMISSIONER MILLER: With permission for the
5 committee to redraft where you put in "discretion of
6 the court." Otherwise, you correctly stated it.

7 COMMISSIONER GUILLOT: Is that going to be in
8 the comment, the criteria?

9 COMMISSIONER MILLER: No. I would actually
10 think it would be appropriate to put in it the statute,
11 Pat. But what you're really doing is trying to set up
12 some guidelines for the court. They're fairly obvious:
13 What is the repetition of the offense, the seriousness
14 of the thing. Higher drug dealing would be sanctioned
15 harder than lower drug dealing, and so on.

16 CHAIRMAN LEINENWEBER: Commissioner, on the
17 motion.

18 COMMISSIONER DAVID PEEPLES (Texas): I have
19 been a trial judge, and I can tell you that when the
20 trial court looks and sees that he or she is dealing
21 with drug dealers, you think about your own safety and
22 the safety of your family.

23 It is a great comfort to not have to make this
24 kind of decision to show leniency or to make it three
25 times. It is a comfort to apply a statute that gives

1 you no discretion when you're dealing with these kind
2 of people. I oppose Commissioner Miller's motion.

3 CHAIRMAN LEINENWEBER: Is there any further
4 discussion on the motion? If not, the question is,
5 should Section 703 be amended to eliminate the
6 mandatory three times the proceeds, up to a bracketed
7 number to be determined either by the committee or by
8 the enacting state, subject to the discretion of the
9 court, and that the committee be directed to draft
10 criteria for the exercise of discretion.

11 All those in favor, signify by saying "aye."

12 All those opposed.

13 The "noes" have it. The motion fails.

14 Further discussion. Commissioner.

15 COMMISSIONER FRANCIS J. PAVETTI (Connecticut):

16 With respect to the statute, I feel as though I
17 generally favor the statute. But in response
18 previously to a question, it seems it would apply even
19 though the individual was acquitted in the criminal
20 proceeding.

21 It seems to me that it goes too far to allow
22 for the costs to be recovered for the criminal
23 proceeding, even though the person was acquitted. If
24 he were convicted, it would be one thing. But this
25 type of criminal proceeding can cost huge amounts of

1 dollars.

2 It just seems to me that you are going too far
3 to allow costs to be recovered of an individual who was
4 acquitted in the proceeding.

5 So, I would move that the criminal proceeding
6 costs be recovered only if the person were convicted.

7 CHAIRMAN LEINENWEBER: Your motion . . .

8 COMMISSIONER PAVETTI: Whatever the wording
9 might be, but to make it clear that those costs could
10 be recovered -- for example, if this action is brought,
11 civil action, recover costs for the civil action, but
12 you can't recover costs for the criminal proceeding
13 unless the person were convicted in the criminal
14 proceeding.

15 CHAIRMAN LEINENWEBER: The committee will go
16 along with that, is that correct?

17 COMMISSIONER DAVID A. GIBSON (Vermont): This
18 side of the table does.

19 CHAIRMAN LEINENWEBER: How about that side of
20 the table? Both sides do.

21 Commissioner Langrock.

22 COMMISSIONER PETER F. LANGROCK (Vermont): I
23 am going to make a motion and speak to it. On Line 3,
24 after the word "who," and it is "who are convicted of a
25 violation of Section 411."

1 Let me tell you the reason for it. I think
2 the chairman of the committee put his finger on it. He
3 can't tell the difference between a civil penalty and a
4 fine. I can't either. As far as I know, the
5 Constitution of the United States would not allow the
6 imposition of a criminal fine without conviction beyond
7 a reasonable doubt.

8 What we are having here is, we are going
9 through the back door and we are allowing a criminal
10 trial. And if you think this is a civil trial, that is
11 only because of a little, tiny word. The press, the
12 effect on families, the effect on our system of justice
13 is exactly the same. And what we are doing here by
14 allowing this to stand on somebody who is acquitted or
15 who is never charged with a criminal matter is to
16 change the entire history of our criminal law where
17 people can be convicted and penalized -- and
18 penalized -- without proof beyond a reasonable doubt.

19 I think that it would be an absolute disaster
20 to the image of justice, as far as I am concerned, if
21 somebody were acquitted and had this civil action
22 brought against them, either before or after, or
23 sentenced -- I guess "sentenced" is the word -- a
24 judgment was obtained for some tremendous amount, then
25 later proven to be innocent, or at least could be

1 proven innocent, as opposed to not being convicted.

2 It seems to me that if we are talking -- if
3 you can prove, the prosecutors can prove somebody is
4 guilty of 411, I can say, "take their property." I
5 mean, I can understand that. But to suggest that you
6 can go and take property, which is really a penalty,
7 without meeting the traditional standards of proof, I
8 think that is a mistake. Therefore, I think this
9 amendment deals with that.

10 CHAIRMAN LEINENWEBER: The motion is to
11 substitute for the word "violate" on Line 3, "who are
12 convicted of violating."

13 Is that correct, sir?

14 COMMISSIONER LANGROCK: Yes.

15 CHAIRMAN LEINENWEBER: Does the committee wish
16 to comment on the motion?

17 COMMISSIONER REID C. PIXLER (Colorado): One
18 example I can think of, just occurred to me here, the
19 skipper of the Exxon Valdez. If he is found not
20 guilty, does that mean that Exxon is free from any
21 civil liability for the consequence?

22 This is what this act is doing in terms of a
23 comparison to the drug trafficking area. It's an
24 ability to take the evidence that is developed from
25 that kind of an investigation and use it to establish

1 the proceeds, track the organization, and acquire the
2 proceeds of the organization.

3 COMMISSIONER JAMES A. YATES (New York): Well,
4 on that point, I don't think that is an apt analogy.
5 Obviously, if you're going to sue Exxon, you sue Exxon.
6 If you are going to sue the skipper, you sue the
7 skipper. The only question here is whether the skipper
8 has to be found guilty before you go for treble damages
9 against him.

10 In the example you are talking about here,
11 just because the skipper may be acquitted in the Valdez
12 case doesn't mean there may not be an independent civil
13 action that can be brought against Exxon. That is
14 really all the motion goes to.

15 CHAIRMAN LEINENWEBER: Commissioner Henderson,
16 on the motion.

17 COMMISSIONER ROGER C. HENDERSON (Arizona): I
18 really think you need to look at this whole section. I
19 think people are going to vote in favor of Peter's
20 motion unless you go back and look at this again.

21 Just for example, he raised this problem that
22 I raised about violation versus conviction.

23 But going back, now I see what you're trying
24 to do here. You talk about criminal enterprise. You
25 don't talk about enterprise until you get down to Line

1 6. You talk about an action against any person or
2 persons who violate Section 411. Then it's about two
3 or three lines later you finally get down to the fact
4 that somehow or other this operates with an enterprise.
5 And you haven't defined enterprise.

6 I think the whole thing really needs to be
7 thought through again. You're not reaching what you
8 want to reach -- that is, the people who are in
9 organized crime, in the enterprise, in getting a joint
10 and several judgment against them. Then you can take
11 up Peter's point about whether or not they have to
12 actually have been convicted, or you are going to
13 proceed to prove under this civil action that they
14 violated 411 by a preponderance of the evidence. It's
15 not well-thought-out.

16 COMMISSIONER DAVID A. GIBSON (Vermont):
17 Section 411 is entitled "continuing criminal
18 enterprise," and sets forth the criteria for that
19 enterprise to -- as to how it's set up. So that I
20 would respectfully disagree with what you just stated.

21 CHAIRMAN LEINENWEBER: Commissioner Langrock,
22 to close on his motion.

23 COMMISSIONER PETER F. LANGROCK (Vermont):
24 Very brief. I think that, in a sense of fundamental
25 fairness to this body, we are talking about a penalty.

1 And we are talking about bringing somebody into the
2 ambit of the court, accusing them of being violators of
3 the continuing criminal enterprise. We are accusing
4 them of being mafia.

5 We have the possibility for ethnic problems.
6 We have the possibility for just a charge of really
7 criminal activity with tremendous penalties, taking all
8 their property, but we are imposing a standard here
9 which is one of preponderance of the evidence.
10 Preponderance of the evidence in a civil case, in as
11 highly charged an area as this, is no protection for
12 the innocent.

13 Yes, this will help get you some kingpins.
14 But it also may drag in a lot of innocent people, a lot
15 of innocent families. It just seems to me that we have
16 not yet abandoned the principles of justice in this
17 country, of finding somebody guilty beyond a reasonable
18 doubt before we impose penalties such as fines and the
19 indications of this statute.

20 CHAIRMAN LEINENWEBER: The motion is to amend
21 Line 3 of Section 703 to read: Person or persons
22 convicted of violating Section 411.

23 All those in favor, signify by saying "aye."

24 Those opposed, "no."

25 The "ayes" appear to have it. Motion carries.

1 Further discussion of 703.

2 COMMISSIONER MILLARD H. RUUD (Texas): Mr.
3 Chairman, may I ask for information. It says in Lines
4 5 and 6, "the proceeds acquired by all persons
5 involved."

6 Proceeds can be a variety of things, just in
7 the initial calculation. One, it's the total gross
8 money received. Is there some limit in the period of
9 time -- received in the last year, received in the last
10 ten years?

11 Are there answers to these questions?

12 COMMISSIONER DAVID A. GIBSON (Vermont): Yes.
13 There are no limits established or intended to be
14 established in that regard. It is meant to cover all
15 proceeds.

16 COMMISSIONER RUUD: Gross income.

17 COMMISSIONER GIBSON: Correct. For whatever
18 duration the enterprise was active.

19 COMMISSIONER W. JACKSON WILLOUGHBY
20 (California): Am I correct in understanding the last
21 vote amended Section 703 to require a criminal
22 conviction before the civil action can be maintained?

23 CHAIRMAN LEINENWEBER: The conviction of
24 Section 411.

25 COMMISSIONER WILLOUGHBY: Then what is the

1 purpose of having a civil action at all? Why don't we
2 ask the committee to reword Section 703 and simply say
3 that if you are -- upon conviction, add a fine of
4 treble damages? Why bother with the civil action at
5 all?

6 COMMISSIONER DAVID A. GIBSON (Vermont): That
7 may well be a good route to go. Of course, you have
8 different issues involved in terms of establishing what
9 those damages are that would become a fine and how to
10 triple them. I suppose you would have a subsequent
11 hearing, and, after conviction, for the jury to
12 determine what the value is.

13 COMMISSIONER WILLOUGHBY: Will the committee
14 consider doing that?

15 COMMISSIONER GIBSON: Yes.

16 CHAIRMAN LEINENWEBER: Commissioner.

17 COMMISSIONER RAYMOND P. PEPE (Pennsylvania):
18 I continue to be extremely disturbed by the comments of
19 Commissioner Langrock and more recently Commissioner
20 Ruud, that the measure of damages in this section is
21 just -- it's outrageous, if you go all the way up the
22 organization.

23 I thought the best suggestion was the one made
24 by Commissioner Miller, to handle this like an ordinary
25 civil penalty. That motion was defeated.

1 I would like to suggest another approach,
2 which would be to calculate treble damages based on the
3 portion of the proceeds from the enterprise for which
4 the persons who are being subject to treble damages
5 served as organizers, supervisors, or managers. So,
6 it's not the whole enterprise. I mean, it would
7 clearly be an outrageous statute if we said that the
8 civil penalty is five billion dollars, and it would
9 offend everyone's sensibilities. We know in fact that
10 is what we are doing, but we are going ahead and doing
11 it anyway.

12 We ought to strive for some manner to define
13 these civil penalties more appropriately. One approach
14 might be to only focus in on the portion of the
15 enterprise for which the person or persons subject to
16 treble damages actually served as the organizers,
17 supervisors, or managers.

18 I would like to hear the committee's reaction
19 to that and hear whether or not you would take it under
20 advisement as a suggestion. If not, I would like to
21 offer it as a motion.

22 COMMISSIONER GIBSON: Commissioner, we will be
23 glad to take it under advisement. I think that maybe
24 in fact by the recent action of this conference, these
25 penalties are no longer civil ones, but became

1 criminal.

2 CHAIRMAN LEINENWEBER: Any further discussion
3 on Section 703? Yes, sir.

4 COMMISSIONER DAVID D. BIKLEN (Connecticut):
5 On Line 5, we use the term "proceeds." Do we know what
6 that means?

7 COMMISSIONER GIBSON: We do have a definition
8 of proceeds, but it's in the forfeiture section.

9 COMMISSIONER BIKLEN: It applies only to the
10 forfeiture section also, I believe.

11 COMMISSIONER GIBSON: As presently drafted,
12 that is correct. We will take a look at it to see
13 whether it should apply to this, but then I think
14 somewhere I saw language that proceeds are proceeds are
15 proceeds, so I don't know how well you can define it.

16 CHAIRMAN LEINENWEBER: We will proceed to read
17 Section 704, please.

18 COMMISSIONER JAMES A. YATES (New York):

19 "[SECTION 704. STATUTE OF LIMITATIONS. A
20 civil action under this [Act] must be commenced within
21 [seven] years after the last conduct giving rise to
22 forfeiture or to the claim for relief became known or
23 should have become known, excluding any time during
24 which either the property or defendant is out of the
25 state or in confinement or during which criminal

1 proceedings relating to the same conduct are in
2 progress.]"

3 CHAIRMAN LEINENWEBER: Discussion. Seeing no
4 one -- yes, sir.

5 COMMISSIONER NEAL OSSEN (Connecticut): I am
6 concerned about a seven-year statute of limitations on
7 a forfeiture proceeding. And I presume that that is
8 what the comments say. So, that means that -- do I
9 take it that seven years after an arrest, somebody
10 decides, gee, we ought to go back and forfeit some
11 property? Is that what you're saying?

12 COMMISSIONER GIBSON: Yes. It is a seven-year
13 statute of limitations. The seven is in brackets. In
14 fact, this whole section is in brackets, and we leave
15 it to the individual states as to what period of time
16 they wish to put in.

17 COMMISSIONER OSSEN: So, you have the section
18 in brackets and you also have "seven" in brackets.

19 COMMISSIONER GIBSON: Correct.

20 COMMISSIONER OSSEN: So, we don't need any
21 motions?

22 COMMISSIONER GIBSON: Not if the motion were
23 to bracket it, no.

24 [Laughter]

25 COMMISSIONER OSSEN: I was going to limit the

1 seven, but since it is in brackets, I will trust that
2 my state will have intelligence.

3 COMMISSIONER JOHN H. LANGBEIN (Illinois): If
4 I read this correctly, there is a further extension of
5 the statute of limitations for -- this is Line 19 --
6 the circumstance in which the defendant is in
7 confinement.

8 Now, that is a funny occasion for tolling a
9 statute of criminal limitations, because you know
10 exactly where to find them. Could that be explained to
11 me, its full wisdom.

12 COMMISSIONER GIBSON: I think the reason for
13 it was that when a person is in jail, they're deemed to
14 be under a disability relating to civil lawsuits. At
15 least insofar as this act is concerned, we felt we were
16 doing a favor to the person by allowing him to get out
17 of jail and be more able to respond if it's against
18 him, or assert his claim if that is what he chooses to
19 do.

20 CHAIRMAN LEINENWEBER: Commissioner Read.

21 COMMISSIONER HAROLD E. READ, JR.

22 (Connecticut): I am wearing another hat. We have
23 something called a joint editorial board on real
24 property acts, which is a group manned by this
25 conference and the ABA, with the duty of keeping an eye

1 on what happens with real property under our various
2 acts.

3 One of the things we try to do is maintain the
4 integrity of the land records. Now, if I see what is
5 going on here, there is a violation of the act. The
6 the conduct occurs, and title transfers to the state,
7 unless there is an exemption. A piece of real property
8 is given to someone with no consideration, or a cohort
9 in crime or whatever, and that property is then sold to
10 a BFP, and then it is given to a drug dealer, and then
11 it goes to another BFP, and all kinds of transactions
12 that are going to occur during this period of seven
13 years after discovery of the event, which may be 14
14 years, as far as I can see.

15 Now, because of the problem of the transfer of
16 title to the state at the time the offense occurs, you
17 won't be able to have any BFP's in all that period.
18 You can have a bona fide purchaser from the offender.
19 I can see that. But when the title gets out into a
20 subsequent chain of title owned by other people, and
21 with the title having been acquired from a person -- I
22 mean, the conveyance having come from a person who had
23 no title, then you have a whole series of invalid
24 conveyances to people who think they're BFP's but who
25 are not, simply because of the lack of title.

1 Now, am I misconstruing something? I think
2 that is exactly what happens here. You have a
3 perfectly clear chain of title. There is nothing on
4 the land records to warn anyone, no matter who he is,
5 that there is any possibility of a problem. And many,
6 many years later, all of a sudden the problem arises
7 that within the chain of title is this drug person who
8 didn't have any title and therefore all of the
9 subsequent conveyances are no good.

10 COMMISSIONER GIBSON: I think that the
11 provisions for exemption would insulate those
12 subsequent owners of the real estate from any
13 forfeiture taking place later on. I would have to look
14 at Section 505 more carefully, but I think that would
15 be the result of it.

16 COMMISSIONER READ: So, it doesn't make any
17 difference that there was a conveyance without title,
18 as long as at some subsequent date a BFP finds his way
19 into the chain of title. Is that what you are saying?

20 COMMISSIONER GIBSON: I think 505(a)(1)(ii)
21 covers that, yes.

22 COMMISSIONER ELLEN F. DYKE (District of
23 Columbia): Excuse me.

24 MR. HARRY HARBIN: If I could dispel what I
25 think are some misconceptions about the "relation back"

1 doctrine, the way it works. It's not a radically new
2 doctrine. Indeed, it's one that existed since the
3 Supreme Court determined it in 1890.

4 The way the works is this: It's a legal
5 fiction that in the absence of any statutory exemption
6 would give the government the power, upon entry of an
7 order of forfeiture, to knock out all subsequent
8 purchasers. However, the Uniform Controlled Substances
9 Act, like the federal criminal CCE statute and RICO
10 statute, protects the interests of intervening
11 purchasers of -- bona fide purchasers for value.

12 It is true that once an order of forfeiture is
13 entered, the government's title to the property is
14 deemed to relate back to the date of the commission of
15 the offense, but people who buy for value in a bona
16 fide transaction are protected under the federal
17 statutes, as they are protected under the UCSA.
18 They're exempt.

19 COMMISSIONER JAMES A. YATES (New York): Mr.
20 Chairman. I think you may have put your finger on one
21 potential problem, though, and that would be where the
22 intervening person who is entitled to claim an
23 exemption is no longer around to prove that he is
24 entitled to that exemption.

25 So, you could have the "relation back"

1 doctrine, then a person in the middle who, in the chain
2 of title, was eligible to claim an exemption, but
3 didn't, and sold later to a bona fide purchaser. And
4 then you are going to have the question of whether or
5 not that bona fide purchaser is in a position to assert
6 the facts as to the prior holder.

7 I haven't really thought that through, but I
8 think you put your finger on a potential problem.

9 COMMISSIONER READ: Assuming that a BFP is
10 protected, if the present owner is a BFP; he has his
11 own protection, I take it.

12 COMMISSIONER REID C. PIXLER (Colorado): Sure.

13 COMMISSIONER READ: Under the explanation we
14 have just been given. But if the present owner is an
15 heir, for example, or the transferee of an heir, then
16 you have to prove, perhaps, that the decedent was a BFP
17 because of -- all donees following him.

18 And so there is, perhaps, a very difficult
19 problem of proof. But, of course, that is what land
20 record law is all about, so I guess we can't do much
21 about that.

22 But we really have to be careful in this act
23 to make sure that when something happens with respect
24 to real estate, there is plenty of notice on the land
25 records and that people who dealt with the land records

1 innocently before that notice was there are protected.

2 I will be interested to see how the rewriting
3 of this comes along to make sure that that happens.

4 COMMISSIONER PATRICK C. GUILLOT (Texas): May
5 I address something? I think as a practical matter,
6 Commissioner Read, we don't have that problem.

7 From my understanding of what occurs, you
8 don't have years and years go by before the state says,
9 gee, I think I want to try to forfeit that 400 acres
10 that may be very valuable.

11 As a practical matter, No. 1, they don't go
12 after land that is not going to be economically
13 feasible for them to take, in the first place. Just
14 like you have had clients you advise that it isn't
15 worth prosecuting a lawsuit for civil damages if the
16 defendant has no more money than \$500 or \$1,000 to
17 respond.

18 No. 2, as a practical matter, what is
19 occurring is that kingpin or criminal John Doe is
20 transferring the property to his aunt, his cousin, his
21 nephew or his niece, and he is doing it either, oh, one
22 to two years in advance of being caught, because he's
23 gotten some good legal advice or he is a pretty damn
24 smart guy in the first place, or he is doing it
25 subsequent to getting -- at least hearing of a

1 forfeiture proceeding.

2 It's not going on where John Doe gives it to
3 Mary Smith who gives it to four or five other
4 transferees over a period of two, four, six, or eight
5 years. These things happen fairly quickly, and
6 almost -- in most instances, certainly in the majority
7 of instances, they go to so-called innocent family
8 members who are no more innocent than the man in the
9 moon. That is where the state has the problem of
10 trying to show that they knew something about it or
11 that they were involved in it. You're not dealing with
12 BFP's on down the road, as a practical matter.

13 COMMISSIONER HAROLD E. READ, JR.

14 (Connecticut): I think you just told me you don't need
15 a seven-year statute of limitations, particularly after
16 discovery.

17 COMMISSIONER GUILLOT: That is in brackets.

18 COMMISSIONER READ: It is in brackets?

19 COMMISSIONER ELLEN F. DYKE (District of
20 Columbia): I respectfully differ with you. There is a
21 case in North Carolina that has been on the books for
22 several years now -- I believe it was in '87, an August
23 '87 case -- where homeowner A and B happily bought a
24 home, paid money for that home, had a mortgage on the
25 home with the bank, and there was an eventual

1 forfeiture of a drug dealer that did something
2 nefarious at that house before these owner bought it.

3 That drug dealer, I might add, was never
4 convicted of a crime. The government came in and took
5 the forfeiture, got their order, and the forfeiture
6 related back to the time when the dastardly deed was
7 done, before homeowner bought the property.

8 The court looked at the exemptions which you
9 talk about all the time and said: Those exemptions
10 apply to an owner. Homeowner, you're not an owner.
11 You're not an owner because you never got title. Title
12 was not transferred to you. You are therefore not an
13 owner. You cannot take the exemption. And you sue
14 your title company. And you have a cause of action
15 against the drug dealer because he perpetrated a fraud
16 on you. He sold you a house he didn't have title to.
17 But I am terribly sorry, homeowner. This property was
18 forfeited to the government and is in the name of the
19 government now and never got into your name, so you
20 cannot claim the exemption.

21 That is what is the problem with this statute.
22 And it may be where you want to go with it. But you
23 have to recognize that that is what has been happening
24 in the real world.

25 COMMISSIONER GUILLOT: I can only respond that

1 I don't know the case you're speaking of, nor have I
2 looked at the statute. I assume it could have been the
3 federal one. It may have been the North Carolina
4 statutes.

5 COMMISSIONER DYKE: The federal one.

6 COMMISSIONER GUILLOT: This statute says the
7 owner or interest holder, so that they could come in
8 and say: Even if the judge had the aberration of
9 saying you're not an owner, they're certainly an
10 interest holder just as much as the bank was.

11 COMMISSIONER DYKE: Security interest. An
12 interest holder is a security interest, is it not?
13 It's a secured party. Let's say the bank has some
14 protection from us, but homeowner does not. Just
15 recognize that.

16 CHAIRMAN LEINENWEBER: Anything further on
17 Section 704, which happens to be the statute of
18 limitations.

19 COMMISSIONER PETER F. LANGROCK (Vermont):
20 Commissioner Langbein asked a question before about the
21 purpose of this statute of limitations -- which is not
22 seven years, but could be 37 years.

23 I assume that one of the purposes is that you
24 don't want somebody to say: I will take ten years in
25 jail, hide my money, and come out and make use of it.

1 You want to be able to get at it.

2 And so, therefore, you're talking about
3 tolling it while that person is in confinement. You
4 don't want somebody in for ten years, then to go open a
5 Swiss bank account and thumb their nose. I think that
6 is laudable.

7 I mean, the thing I am thinking, however, is
8 that what you should be talking about here is a
9 different statute of limitations for real property.
10 There is no reason why real property can't be forfeited
11 or procedures started in a relatively short period of
12 time -- one-year period of time, two-year period of
13 time -- and that would deal, at least help go a long
14 way. We haven't seen the forfeiture provisions, so
15 it's hard to argue specifically on it.

16 I think the statute of limitation should not
17 be seven years after somebody is out of incarceration,
18 but, again, some shorter period of time, three or four
19 years, whatever the case may be.

20 I think by dividing those matters up, you get
21 to -- I mean, go where you want. If you're going to
22 hit real property, as you say, we could do it fast.
23 Let's keep the titles clear after that. If you're
24 waiting while people are in jail and you don't want
25 them to come out and spend their money, then toll it,

1 give a reasonable period of time afterwards.

2 CHAIRMAN LEINENWEBER: Anything further on
3 Section 704?

4 COMMISSIONER ROBERT J. TENNESSEN (Minnesota):
5 To follow up on the chain of title problem, I think --
6 I am not sure that the answer is that the exceptions
7 under 505 really work. Here is an example. If there
8 is --

9 CHAIRMAN LEINENWEBER: Commissioner, we are
10 going to stick to Section 704. I appreciate -- we are
11 going to go back to Article 5 if we have time. We want
12 to get through Section 704. Now, if it has to do
13 with --

14 COMMISSIONER TENNESSEN: It has to do with the
15 timing and the relation back of how long a statute of
16 limitations should be and whether or not it ought to be
17 from the time of the discovery of the -- rather, from
18 the time of the event.

19 Let me give you an example as to why that is a
20 problem. I think, when you -- somebody said that it's
21 not a problem because 505 takes care of it. If there
22 is a bona fide purchaser of that property and they
23 purchased it from an individual who turned out to have
24 committed an act that they were unaware of -- BFP --
25 they then, in turn, have that property. Later on, the

1 fact that this guy was a criminal that they bought it
2 from is now public knowledge. That BFP now wants to
3 sell it.

4 In the chain of title, the third person, the
5 new buyer, comes along and says: Well, I looked at the
6 title of this and I notice that Lucky Lucianno owned
7 this property before you bought it. And he has been
8 accused of having acquired that property with illegally
9 obtained proceeds.

10 Now, how can the person who is a BFP sell his
11 property, and how could anybody else who, you know, is
12 supposed to have known, knew or should have known that
13 that was proceeds or property obtained improperly, or
14 with improper proceeds, ever protect themselves?

15 Because if, in fact -- the government would no
16 doubt say that Lucky Lucianno owned that property. You
17 may have been a BFP, but now everybody in the world
18 knows that it was acquired with illegally obtained
19 money, and anybody who would come along after that and
20 try to buy it would not be covered by the exemption.

21 So, I think there is a title problem. I think
22 there is a timing problem. I think you ought to deal
23 with it.

24 CHAIRMAN LEINENWEBER: Anything further?

25 COMMISSIONER HARVEY S. PERLMAN (Nebraska):

1 Would it be possible to go back to 703 for half a
2 second? I really want to see if the committee believes
3 that it is disabled by our action from thinking about a
4 civil remedy of some kind. It seems to me the
5 situation we are in -- and we have been in it several
6 times before --- that the way this draft was drafted, it
7 was so overreaching that the conference wouldn't buy it
8 without a provision for burden of proof beyond a
9 reasonable doubt.

10 But at least in my own personal view, if you
11 came back with something that was not -- that you
12 couldn't get triple damages -- not everything that the
13 cartel did, but that you could get triple damages,
14 triple the amount of the benefit that this individual
15 got, or something like that, it may make a flexibility
16 of remedy that this act needs.

17 My sense was, from the chairman of the
18 Drafting Committee, that you felt precluded from doing
19 that, at least thinking through that, or not?

20 COMMISSIONER DAVID A. GIBSON (Vermont): No,
21 we are not precluded from looking at it in that
22 context.

23 COMMISSIONER PERLMAN: Thank you.

24 CHAIRMAN LEINENWEBER: Further discussion on
25 704?

1 COMMISSIONER RICHARD B. LONG (New York): This
2 may be a style or a drafting question, but with
3 reference to the two tolling situations on 17 and 18,
4 it provides that when either the property or defendant
5 is out of the state or in confinement.

6 Could the committee give us an illustration of
7 when you might have property in confinement. I trust
8 you will take care of that.

9 [Laughter]

10 CHAIRMAN LEINENWEBER: Anything further.

11 COMMISSIONER STEPHEN G. JOHNAKIN (District of
12 Columbia): As a real estate lawyer, I am very
13 concerned about that example that Commissioner Dyke
14 gave about what might happen under the provisions of
15 this act, and apparently has happened in North
16 Carolina.

17 I have not heard any reassurance from the
18 committee that they're going to do something to fix
19 that so that that can't happen.

20 COMMISSIONER GIBSON: We don't think it would
21 happen under this act. The "relation back" doctrine is
22 specifically limited to that situation where a court
23 has declared that the property is forfeited, in Section
24 514(h), I think it is, or whatever.

25 COMMISSIONER JOHNAKIN: But I don't find

1 sufficient comfort in 505(a)(2), because there I have
2 to acquire the property in the ordinary course of
3 business.

4 What if it's not ordinarily in my course of
5 business to be dealing in real estate, but I happen to
6 buy some tainted property, then I sell it to a bona
7 fide purchaser? Not knowing of the potential problem
8 myself, I sell it with a general warranty deed. He
9 finds out that I had no title and that he has no title,
10 and he's got a lawsuit against me.

11 COMMISSIONER GIBSON: Take a look at 514(e).
12 If you're still uncomfortable, we will revisit it.

13 CHAIRMAN LEINENWEBER: Mr. President, the
14 Committee of the Whole rises and reports that it has
15 had under consideration the Uniform Controlled
16 Substances Act, has made progress, and asks leave to
17 sit again.

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1 SIXTH SESSION

2 UNIFORM CONTROLLED SUBSTANCES ACT

3 MONDAY, JULY 16, 1990

4 Harry D. Leinenweber of Illinois, presiding.

5 CHAIRMAN LEINENWEBER: The Chair recognizes
6 the committee chairman, Mr. Gibson, for a motion.

7 COMMISSIONER DAVID A. GIBSON (Vermont):

8 Following the events on Saturday, the committee met
9 early Sunday morning to resolve where we go from here
10 with the Uniform Controlled Substances Act. As
11 determined at this time, the best course of action,
12 from its point of view, would be to proceed to try to
13 finalize Articles I through IV and VI and VII, and to
14 remove from consideration at this time Article V
15 dealing with forfeiture.16 The Executive Committee and the Scope and
17 Program Committee would then resolve just what to do
18 about continuation of any consideration of the article
19 on forfeiture, either to be presented later, to be
20 inserted into the Uniform Controlled Substances Act, if
21 approved, later this week, or to have it as a
22 freestanding act of its own, or just to scrap the
23 effort altogether.24 With that recommendation from the committee, I
25 would, therefore, move, Mr. Chairman, that Article V be

1 deleted from the draft of the revision to the Uniform
2 Controlled Substances Act at this time.

3 I also am reminded that the reporter wanted to
4 have a lineup of our committee members, so before
5 relinquishing the microphone, I will identify again the
6 members of the committee and advisers on the podium
7 here.

8 Starting at my far left is Commissioner
9 Patrick Guillot.

10 Next to him is the adviser from the Department
11 of Justice, Harry Harbin.

12 Next to him is David Joranson, adviser from
13 the State Controlled Substances Authorities.

14 To Mr. Joranson's right is Commissioner Reid
15 Pixler.

16 Next to him is Commissioner Ferrer.

17 Next to him is the chairman of the Committee
18 of the Whole, Commissioner Leinenweber.

19 On my far right is the chairman of the
20 division, Curtis Reitz.

21 Next to him, Commissioner John Deacon.

22 Next to him, Commissioner Buringrud.

23 And approaching from the right is Commissioner
24 Braun.

25 Commissioner Robinson is not able to be in

1 attendance. Commissioner Yates had to return to New
2 York. He also is not here at this time.

3 Thank you.

4 CHAIRMAN LEINWENBER: There is a motion on the
5 floor from Commissioner Gibson that Article V be
6 deleted from the draft of review of the Uniform
7 Controlled Substances Act.

8 Discussion on that, Commissioner Langrock.

9 COMMISSIONER PETER F. LANGROCK (Vermont): I
10 have a little bit of history -- I am rising to oppose
11 the motion -- a little bit of history I think is
12 worthwhile on this matter.

13 We had a forfeiture provision in the previous
14 act in 1973. We revised it and we came up with
15 something in 1988. Where we were in 1988 is somewhere
16 where we are today as far as policy issues go on
17 forfeiture.

18 At the 1988 meeting, I am going to quote to
19 you, this is when we are talking about the prosecutors:
20 This coalition led by APRI's National Drug Prosecution
21 Center and using the technical expertise of the
22 front-line prosecutors in the drug control working
23 group successfully blocked adoption of these harmful
24 provisions.

25 What has happened here, this conference, this

1 week, made some really strong policy decisions, and
2 good policy decisions. The committee had originally, I
3 think, come close to those. The prosecuting lobby, for
4 some reason or other, was able to persuade the
5 committee to take very strong measures. The
6 prosecution lobby yesterday referred to this group,
7 as -- I think the exact words were -- this group which
8 is wealthy, white males is incapable of producing a
9 forfeiture provision that is acceptable to us.

10 I am not ready as a commissioner to retreat.
11 I know this body can produce a good forfeiture
12 provision. We can do it based upon the principles
13 adopted by this house at this session. We could do it
14 at this session. I appreciate the fatigue the
15 committee may feel. But for us to go and send out this
16 act without a forfeiture provision can be interpreted
17 three ways. One, that the old forfeiture provisions
18 are perfectly good. Two, there should be no forfeiture
19 provisions. Three, that this group is incapable of
20 writing a forfeiture provision in connection with it.

21 I think any of those are unacceptable. I
22 think whether we have to come back another year or we
23 have to spend a night session here this year to do it,
24 we should do a complete act the way it is.

25 What we have here is a group of people, and

1 you see the information -- let's call it what it is.
2 The prosecutors who have lobbied this -- and they're
3 unhappy, they're unhappy where we came out as a house.
4 They want to take part of their football and go home.
5 I say that we should not bow down to that pressure,
6 that we should have a complete act, do the job that we
7 started to undertake and not be -- I just find their
8 tactics, their language, offensive to this body. And I
9 hope that whether we do it now or we do it next year,
10 we should have a complete act.

11 I point out to you, as much as I like floor
12 time -- the great act which you will hear is the
13 Uniform Transfer of Litigation Act. I think that this
14 is one of the critical things in our nation. And for
15 us to abdicate here just because we want to get rid of
16 it is a mistake. We should face up to the facts and
17 take the time and do a quality job.

18 I'm reminded of my Professor Louellen, who
19 said that what we need is craftspersons who can put
20 together a statute of quality. We have them here. We
21 should not send this out to the rest of the country,
22 which is looking for this, in a half-baked,
23 half-finished fashion.

24 CHAIRMAN LEINENWEBER: Commissioner on the
25 mction.

1 COMMISSIONER ALVIN J. MEIKLEJOHN, JR.

2 (Colorado): I rise to say that I think we ought to
3 adopt this motion. What has been going on in here --
4 and I am not a prosecuting attorney, I'm not a defense
5 attorney. In fact, maybe I'm not much of anything.
6 But this is not the real world.

7 The people of the United States are sick and
8 tired of the pain and the grief and the cost of drug
9 trafficking. If we can't send a strong forfeiture
10 provision from this commission, then we ought to let
11 the states do it themselves.

12 I was very disappointed in what the conference
13 did the other day with reference to the amendments.
14 And I can tell you, the people are looking for
15 leadership and help in stamping this out. We haven't
16 even seen the beginning of the grief. Wait until the
17 crack kids, the generation of crack kids are in our
18 schools, and on and on. The only way we are going to
19 stop this drug trafficking is to take the fun out of
20 it, and that comes back to removing the economic base.
21 But what we did here to Article V so weakens it, I
22 think the committee is right and we ought to confess
23 that we can't do it.

24 CHAIRMAN LEINENWEBER: Commissioner Ring on
25 the motion.

1 COMMISSIONER CARLYLE C. RING, JR. (Virginia):
2 I rise to support the motion as well, reluctantly, but
3 I think realistically.

4 Commissioner Langrock is certainly right.
5 It's unfortunate that neither we as a country nor this
6 Conference at this time can come up with something that
7 has a practical opportunity to be enacted on a uniform
8 basis. •But I remind Commissioner Langrock that our
9 Constitution has two provisions concerning products of
10 this conference. One is that there is a need for
11 uniformity. I think there is a need for uniformity in
12 this field. Second, but equally important, is that
13 it's got a chance to be adopted on a uniform basis.

14 We have struggled now with this issue,
15 forfeiture, for three or four years. This conference
16 itself is very divided. We have powerful groups out
17 there in the country that are divided on this issue.

18 I think that we compromise our ability to pass
19 the other good amendments that are in this act by
20 insisting that the committee, which is Mr. Langrock's
21 proposal, insisting that they proceed with an endeavor
22 where we have not been able to bring about an
23 accommodation and a consensus among the interested
24 groups that are out there. It's unfortunate to have to
25 leave it to the individual states to deal with this

1 issue.

2 I know my own city council where I chaired a
3 task force on the drug problem, one of our
4 recommendations that is continuing to be pursued is
5 that there be stronger forfeiture provisions in the
6 Commonwealth of Virginia.

7 Peter, there is controversy about how they
8 should be shaped. Virginia is probably going to do it
9 its way, and Vermont is going to do it their way. That
10 is just one of the realities. I think we've got to
11 stick by our constitutional standard and concede in
12 this particular instance that we cannot, as a practical
13 matter, come up with something that is going to be
14 adopted in Vermont and adopted in Virginia on
15 forfeiture in the same manner.

16 CHAIRMAN LEINENWEBER: Commissioner Baggett on
17 the motion.

18 COMMISSIONER BRYCE A. BAGGETT (Oklahoma): For
19 a substitute motion.

20 CHAIRMAN LEINENWEBER: Yes, sir. You move to
21 amend the motion, is that correct?

22 COMMISSIONER BAGGETT: No. For a substitute
23 motion. I have a motion in substitution on the motion
24 on the floor.

25 CHAIRMAN LEINENWEBER: I think technically

1 that is a motion to amend under our rules.

2 COMMISSIONER BAGGETT: I think technically it
3 is, and I appeal the ruling of the chair.

4 CHAIRMAN LEINENWEBER: Proceed.

5 COMMISSIONER BAGGETT: What is the ruling of
6 the chair? I offer a motion in substitution for the
7 pending motion. Is it accepted? May I at least
8 explain it?

9 CHAIRMAN LEINENWEBER: You may. As I
10 understand it, a motion to amend the main motion is
11 always in order. It's debatable. It, itself, is
12 amendable. You may proceed.

13 COMMISSIONER BAGGETT: I do not offer this
14 motion to amend the main motion. I offer this as a
15 substitute to replace the main motion.

16 CHAIRMAN LEINENWEBER: Who is the
17 parliamentarian?

18 COMMISSIONER GENE N. LEBRUN (South Dakota):
19 Mr. Chairman, I think it's a matter of semantics.
20 They're both the same. He can call it a substitute
21 motion if he likes. It's a matter of semantics.

22 CHAIRMAN LEINENWEBER: The motion is in order.

23 COMMISSIONER BAGGETT: Gentlemen of the
24 conference, it has been said that we are too busy to do
25 this work. Gentlemen, if we are too busy to do this

1 work, we are too busy.

2 I don't know about you, but I was impressed by
3 receiving a letter from the President of the United
4 States, who said that this subject was important. If
5 it is important enough for him to write to this
6 conference, which is the first time I can remember in
7 24 years as a commissioner receiving a letter from the
8 President, then certainly it's worth our time and
9 attention to this subject.

10 In response to something our good former
11 president said a moment ago, this conference cannot sit
12 silent on this subject and, quote, leave it to the
13 states. The reason we can't do that is we have already
14 laid before them a recommendation in the Uniform
15 Controlled Substances Act that we promulgated nearly 20
16 years ago. That recommendation stands out there as our
17 recommendation until such time as we amend or revise
18 it. We have neglected to do so over many years while
19 this subject has gained even greater currency and need
20 for effective uniform laws throughout this land.

21 It is time for us to act. And waiting another
22 year on a problem of such critical importance that it
23 occupies the time of the Congress -- We get a drug
24 czar appointed, and yet the President and the Attorney
25 General point out that nine out of ten of these cases

1 are handled in state courts under state law.
2 Gentlemen, we cannot neglect our responsibility in this
3 area.

4 I am prepared, if we can get down to debating
5 these subjects, to bring you a lot of information that
6 you have been fortunate enough not to have. I will
7 tell you about my personal experiences. I know that
8 sometimes we think on this floor that personal
9 experiences should not be received, that anecdotal
10 evidence is invalid.

11 Well, I am like Will Rogers. Forgive me for
12 speaking from personal experience, but I have had no
13 other kind. I have had some of the treatment of the
14 untender mercies of those righteous zealots who seize
15 property in punishment for criminal offenses, but
16 decline to afford the protections and rights of the
17 Bill of Rights.

18 It is clear that afoot in this land today is
19 the principle that property should be seized and
20 forfeited as punishment for crime. We are hypocrites
21 if we deny that we are seizing property as punishment
22 for crime. The historical notion that the property
23 itself offended the king, therefore making it
24 contraband and subject to forfeiture is a fiction we
25 cannot honestly indulge. If we admit and acknowledge

1 that it is being forfeited as punishment for crime,
2 then if we love and respect the Bill of Rights, we must
3 insist upon its application here.

4 Gentlemen, this is a transitory issue, I pray
5 to God. I hate drugs. If you knew what they had done
6 to my family, you would know why.

7 But the drug war -- you know, if you enjoyed
8 World War II, if you enjoyed the Korean conflict, if
9 you enjoyed the Vietnam War, you must be really loving
10 the war on drugs. It's a war on our own children. But
11 if the war on drugs is anything, it is also a war on
12 the Bill of Rights.

13 Remember what Hiram Johnson, a great U.S.
14 Senator, once said, "The first casualty of war is
15 truth." The Bill of Rights which has endured more than
16 200 years is the issue at stake. And if we in our
17 temporary urge and zeal to deal with this drug problem
18 forsake the Bill of Rights, we will be like those
19 people in Germany who said: They came for my neighbor,
20 the Jew, but I was not a Jew so I did nothing. They
21 came for my neighbor, the Catholic, but I was not a
22 Catholic and I did nothing. Then they came for me and
23 there was no one to help me.

24 Gentlemen, if we don't have time for this, if
25 we are too busy for this, we are too busy.

1 COMMISSIONER REID C. PIXLER (Colorado): I
2 would like to --

3 COMMISSIONER BAGGETT: The motion should be
4 read.

5 COMMISSIONER PIXLER: I would like to speak in
6 support of the motion. I don't know what the
7 substitute motion is. I think the preferable way would
8 be to vote on this one and then look at that one.

9 The problem that I see, I have been on this
10 committee, I was one of the commissioners in 1988 who
11 was concerned about the nature of the act. Due to the
12 courtesy of the president of the conference, I was
13 appointed to this committee. I have served on the
14 committee for two years. I have sat and listened to
15 policy debate over two years from very competing and
16 equally dedicated and concerned individuals from the
17 American Bar Association, National Association of
18 Criminal Defense Lawyers and the representatives from
19 the National Association of Attorney Generals, and the
20 NDAA. The committee listened to a lot of debate about
21 policy. That is over a two-year period. It's very
22 difficult to try to reproduce all of the important
23 debate here in this conference.

24 The problem has been focused on forfeiture for
25 a very long time. Mr. Baggett really tried to hold the

1 entire thing from consideration in Hawaii last year.
2 This has been delayed to a point where the important
3 aspects of the rest of the act need to be released. It
4 can't continue with delay while we fine-tune and work
5 out these other questions. The work that was done
6 Saturday indicates this can be a very long process. We
7 didn't even make it a third of the way through that
8 section. People were complaining about the fact that
9 this was the first reading. We need to get through it
10 once, yes.

11 I think the frustration of the committee --
12 and this was the committee, the polling of the
13 committee occurred prior to any comments from any of
14 the advisers.

15 In all seriousness, I am sorry. I'd like to
16 have been able to do a better job to explain the policy
17 ramifications to you, and we haven't done that to the
18 satisfaction of the conference. I recognize that from
19 the comments that have occurred since Saturday. But
20 that was an act that was developed. We needed to be
21 talking about the policy questions and fine-tuning the
22 language. There are problems with it. It needs to be
23 worked on. We are not, frankly, going to get anything
24 done except some sort of thrown-together thing, because
25 the wholesale changes that were made from the floor

1 defeat the very purpose of it. You don't want to send
2 something out like that, that is not going to be
3 effective or used.

4 I think the best thing, whatever the Scope and
5 Program Committee and the rest of the conference wants
6 to do with that section, whether making it a
7 stand-alone act or trying to improve it over time, can
8 only be better than what we are producing today.

9 I supported the motion. David Gibson had
10 asked me well before the committee meeting ever opened.
11 And I believe that the very best thing to do is let
12 this act go without the forfeiture, get it out there,
13 because there are too many great advantages that are
14 contained in schedulings, the concept that is laid out
15 here in the user demand reduction fees that are
16 associated with educational things that are included
17 within it. Particularly the designer drugs and the
18 analogs, the precursor chemicals are terribly
19 important.

20 So, aside from all the other rhetoric, the
21 point is what can we realistically do this week.
22 Frankly, we are not going to reproduce two years of
23 work, and be able to fine-tune and polish these things,
24 that is effective. It will be a hodgepodge of
25 something that cannot work and could only discredit the

1 conference.

2 COMMISSIONER HAROLD E. READ, JR.

3 (Connecticut): Point of order. There is before the
4 house, I think, either an amendment or a substitute
5 motion, or whatever you call it, of Mr. Baggett's. I
6 don't think we know what it is.

7 CHAIRMAN LEINENWEBER: I will read the motion.

8 From the Commissioner of Oklahoma:

9 "A. To redraft Article V, Sections 501 et
10 seq. to express the following principles as policies of
11 NCCUSL:

12 "1. That forfeiture of property is not to be
13 used to punish for criminal conduct unless and until
14 the owner of property seized and sought to be forfeited
15 is accorded, with respect to such property in the same
16 manner as with respect to his or her person, all of the
17 individual rights provided in the Bill of Rights and
18 elsewhere in the Constitution of the United States and
19 in the Constitutions of the 50 several States,
20 including but not limited to:

21 "(a) the presumption of innocence; i.e., that
22 the government has the burden of proving beyond a
23 reasonable doubt its accusations.

24 "(b) the right to due process of law,
25 including at a minimum, notice and an opportunity to be

1 heard before an impartial magistrate.

2 "(c) trial by jury.

3 "2. That contraband per se is subject to
4 seizure and forfeiture in rem because no person can
5 assert any ownership in contraband inasmuch as mere
6 possession of contraband constitutes an offense for
7 which punishment is prescribed.

8 "3. That property which is not contraband per
9 se should not be seized and cannot be forfeited unless
10 and until the prosecutor and the courts have afforded
11 due process of law to the owner of such property and to
12 all those who claim interest therein.

13 "4. To prescribe specific time limits for
14 each step in the forfeiture procedure lest discretion
15 in the government as to the time duties must be
16 performed defeat or diminish the rights of individuals.

17 "5. To revise the other Articles of this Act
18 to be consistent in principle and purpose with the
19 foregoing principles.

20 "B. On Page 21 at Line 14 to strike (or
21 bracket) subsection (b) of Section 203 and the
22 corresponding" --

23 COMMISSIONER PETER F. LANGROCK (Vermont):
24 Point of order. How much more is there?

25 CHAIRMAN LEINENWEBER: Pardon?

1 COMMISSIONER LANGROCK: How much more have you
2 got of the -- how long --

3 CHAIRMAN LEINENWEBER: Halfway through,
4 approximately.

5 COMMISSIONER LANGROCK: I would think that
6 this motion is actually out of order. This calls for a
7 broad-based, multiple-faceted policy decision which was
8 discussed here on the floor Saturday, and many votes
9 which have already taken positions consistent with this
10 or not consistent with this. And I think it's an
11 inappropriate motion. We are dealing with a procedure
12 at this point.

13 I am not out of sympathy with what he says,
14 but I think this is not the way to get at the issue.

15 CHAIRMAN LEINENWEBER: Where is the
16 parliamentarian, Mr. Lebrun?

17 COMMISSIONER GENE N. LEBRUN (South Dakota):
18 Since this is a different session, I believe the motion
19 is in order. You could not have raised those same
20 issues at the same session, but at a different session
21 they can be raised.

22 CHAIRMAN LEINENWEBER: The motion is in order.
23 I will continue to read.

24 COMMISSIONER HAROLD E. READ, JR.
25 (Connecticut): Another point of order. It is obvious

1 to me that regardless of the other point of order, this
2 motion is too large for this body to act upon without
3 having it before us in writing. I would therefore
4 suggest that you let the motion lay on the table until
5 that material can be reproduced. I presume that could
6 be done as early as this afternoon.

7 CHAIRMAN LEINENWEBER: I am not sure if that
8 is in order.

9 COMMISSIONER LEBRUN: I don't believe a
10 tabling motion is proper in the Committee of the Whole.

11 COMMISSIONER BRYCE A. BAGGETT (Oklahoma): Mr.
12 Chairman, I think that the motion -- I mean, the point
13 of order is not a valid point of order. But as a
14 request, I would certainly accede to it, provided the
15 main motion lies with this motion until it can be
16 timely presented.

17 CHAIRMAN LEINENWEBER: I am not sure that one
18 commissioner can accede to waiving the rules.

19 COMMISSIONER LEBRUN: If Commissioner Read was
20 moving to table, that would be out of order. You
21 cannot table in the Committee of the Whole.

22 COMMISSIONER READ: Sir, I move the Committee
23 of the Whole resolve itself back into the Conference
24 for the purpose of tabling this motion until it can be
25 before us on our desks in writing.

1 CHAIRMAN LEINENWEBER: Just a moment.

2 Commissioner Lebrun.

3 COMMISSIONER GENE N. LEBRUN (South Dakota): I
4 believe that would be a proper motion.

5 CHAIRMAN LEINENWEBER: That motion is in
6 order.

7 Commissioner Gibson on that motion.

8 COMMISSIONER DAVID A. GIBSON (Vermont): I
9 personally oppose further delay on this act. In my
10 more cynical moments, I think a lot of what has gone on
11 is simply for the purpose of delay. But I know that
12 the commissioners do not really feel that they're
13 genuine, so I am refraining from letting those thoughts
14 take control.

15 But I urge this conference, let's deal with
16 this subject right away. It's simply, do we deal with
17 forfeiture this year or not. If you wish us to deal
18 with forfeiture this year, make sure that you
19 understand we will not be able to complete it and
20 present anything to you for vote by roll call of the
21 states. You will in effect have put over the whole act
22 for another year, and maybe two years.

23 The feeling on the committee is very strong
24 that we should proceed with Articles I through IV, VI
25 and VII, line those up as best we can, present them for

1 the states. Let's vote on this motion now, get it over
2 with. We will abide by whatever the decision is. I
3 urge a vote to defeat the substitute motion.

4 Thank you.

5 CHAIRMAN LEINENWEBER: The motion on the floor
6 right now is to adjourn the meeting of the Committee of
7 the Whole and resolve back in the conference for
8 purposes of considering the motion to table the
9 substitute motion.

10 Is there discussion on that? I believe that
11 is a debatable motion.

12 COMMISSIONER BERNARD HELLRING (New Jersey): I
13 agree with Mr. Gibson that the thing to do is get rid
14 of the substitute motion now. You have read half of
15 it. Read the rest of it. I have such confidence that
16 it will be defeated that I think we ought to get rid of
17 it now and then go on to the motion which was on the
18 floor before this effort to substitute another motion.

19 CHAIRMAN LEINENWEBER: Commissioner.

20 COMMISSIONER BORIS AUERBACH (Ohio): The
21 commissioner from New Jersey made my statement for me.

22 CHAIRMAN LEINENWEBER: I didn't hear you, sir.

23 COMMISSIONER AUERBACH: I am just completely
24 agreeing with Commissioner Hellring. I think a motion
25 to table when the motion of the commissioner from

1 Oklahoma has not been completed is inappropriate. I
2 think he is entitled to have it read. I think then we
3 can consider, and I would strongly urge the defeat of
4 that motion so we can proceed with the issue in front
5 of us, get controlled substances out of way this
6 morning in a constructive manner.

7 CHAIRMAN LEINENWEBER: The motion before us is
8 to adjourn the Committee of the Whole so that the
9 conference may consider the motion to table the
10 substitute motion until the same can be in writing and
11 placed upon our desks. Did that accurately state the
12 question, sir?

13 All those in favor, signify by saying "aye."

14 All those opposed.

15 The "noes" have it. The motion to adjourn is
16 defeated. Back to the motion to amend or substitute
17 the main motion.

18 Any further discussion on that motion?

19 Are you ready for the question?

20 A COMMISSIONER: Read it.

21 COMMISSIONER BERNARD HELLRING (New Jersey):
22 You have to read the rest of it first.

23 CHAIRMAN LEINENWEBER: "B. On Page 21 at Line
24 14 to strike (or bracket) subsection (b) --

25 THE COURT REPORTER: Commissioner, this is the

1 court reporter. Please slow down.

2 [Applause]

3 CHAIRMAN LEINENWEBER: "On Page 21 at Line 14
4 to strike (or bracket) subsection (b) of Section 203
5 and the corresponding provisions in Sections 205(b),
6 207(b), 209(b), and 211(b) in order to avoid (or at
7 least alert the states of) the problem of an arguably
8 impermissible delegation of the State's legislative
9 power; and for the same purpose, in Article II by
10 striking (or bracketing) the words 'state or federal'
11 where those words appear, including but not limited to
12 the following:

13 "1. Page 22, Line 21 in Section 204(a)

14 "2. Page 31, Line 15 in Section 206(a)

15 "3. Page 37, Line 26 in Section 208(a)

16 "4. Page 44, Line 20 in Section 210(a)

17 "5. Page 50, Line 2 in Section 212(a)

18 "in order to avoid (or at least alert the States of)
19 the problem of an arguably impermissible delegation of
20 the State's legislative power.

21 "C. And to report an acceptable and enactable
22 revised draft of the Uniform Controlled Substances Act
23 back to the Conference before the annual roll call of
24 the States on Thursday, July 19, 1990, in order that
25 this important and much needed revision of our Uniform

1 Controlled Substances Act (which was promulgated in
2 1973) can be promulgated and recommended by this
3 Conference to the States in 1990."

4 Further discussion on the motion?

5 Seeing none, the question is shall the motion
6 to delete Article V from the Uniform Controlled
7 Substances Act be amended and substituted by the motion
8 as just read by the commissioner from Oklahoma.

9 To close on the motion, Commissioner Baggett.

10 COMMISSIONER BRYCE A. BAGGETT (Oklahoma):

11 Gentlemen of the conference, I will take very little of
12 your time. I hope we have enough time for a few
13 oomments.

14 Mr. Gibson has done a yeoman's job for several
15 years on this project. He despairs of writing, by the
16 roll call of the votes on Thursday, acceptable
17 provisions on forfeiture. I would commit myself to
18 work night and day to accomplish it to your
19 satisfaction, and I say it can be done. I don't have
20 anything more important to do, and I don't believe
21 anybody else here does.

22 In this land, many people are suffering under
23 the laws we have promulgated and recommended to them.
24 As I said, I have had some personal experience with it.
25 Had I not been a lawyer, had I not been able to defend

1 my rights and the rights of my child, these procedures
2 that we set loose upon the people of this land would
3 have eaten me alive.

4 Because of that experience, I am forced to be
5 concerned, and I beg you to be concerned, for all the
6 little people out there who aren't lawyers, who don't
7 have the money, who don't have the persistence and the
8 legal acumen to defend their rights, who depend upon
9 bodies like us to do so. We have a duty and a
10 responsibility here, fellows. Let us not neglect it.

11 I say this job can be done. Today is Monday.
12 The roll call of the states is Thursday. The world was
13 made in seven days. Surely to God we can write Article
14 V in three.

15 Out there today, zealots with the product we
16 put forth 17 years ago are acting as very righteous
17 men. And with the mood of this land, they have much
18 support for acting as righteous men.

19 Remember what Justice Brandeis warned us, the
20 spirit of liberty is the spirit that is not too sure it
21 is right.

22 I don't know the answer to the drug problems
23 of the United States. Certainly decriminalizing the
24 possession and distribution of drugs is not the answer.
25 I am not recommending that. But we must never forget

1 that process is what the Bill of Rights is all about.
2 And we have ravaged due process of law when it comes to
3 forfeiture provisions and what we put out 17 years ago.
4 And if we default in this, we will leave the field to
5 the zealots, the righteous men. And we must give the
6 benefit of the collective acumen of this body, the
7 experience we have had. If it isn't our business,
8 whose business is it?

9 Elected members of the Congress, fearful of
10 the next election, sometimes sacrifice their own good
11 judgment because they have a stake in that next
12 election. We ain't up for the next election. We are
13 here to do the right thing, justice, as we can
14 understand it according to our own lives, collected
15 from all of the states. This is our business. Let us
16 not be too busy to do our business.

17 CHAIRMAN LEINENWEBER: The motion is whether
18 or not the main motion should be amended by
19 substituting the commissioner from Oklahoma's motion.

20 All those in favor, signify by saying "aye."

21 COMMISSIONER HAROLD E. READ, JR.

22 (Connecticut): Point of order. I don't want to do
23 this, but I want to know what the motion is. I haven't
24 time --

25 CHAIRMAN LEINENWEBER: The motion --

1 COMMISSIONER READ: Just a minute.

2 I haven't had time to think of it. I haven't
3 had time to analyze it. It makes a lot of sense in
4 some ways, maybe in all ways, I don't know.

5 Please state the motion. And I invite your --

6 CHAIRMAN LEINENWEBER: The motion is whether
7 or not the main motion, which was to strike Article V,
8 should be amended by substituting a motion which would
9 continue with -- which would instruct the committee how
10 to redraft Article V and instruct the Committee of the
11 Whole to continue deliberating until it came up with a
12 product. We are not voting on whether that should
13 itself be adopted, but whether to consider that as a
14 substitute for deleting, for the purposes of this year,
15 the consideration of Article V.

16 COMMISSIONER READ: Whether to consider what?

17 CHAIRMAN LEINENWEBER: Whether or not we
18 should consider the substitute motion in place of the
19 main motion.

20 COMMISSIONER READ: That's fine. Will you
21 state the substitute motion.

22 CHAIRMAN LEINENWEBER: The substitute motion
23 which we would consider -- we're not considering that,
24 so I am not sure that that is required at this
25 particular time. We will consider that only if we vote

1 in favor of substituting it for the main motion.

2 COMMISSIONER READ: We are to vote --

3 CHAIRMAN LEINENWEBER: We are not voting on
4 the merits of Commissioner Baggett's motion this time.
5 We are voting on whether we should consider that in
6 lieu of deleting Article V.

7 COMMISSIONER READ: We are to vote upon
8 whether a substitute motion will be considered without
9 hearing the substitute motion, is that correct?

10 CHAIRMAN LEINENWEBER: We will hear the
11 substitute motion if we decide to consider it. I have
12 read it, so you know generally what is in it. We will
13 then consider that motion on its merits.

14 Is that correct, Mr. Lebrun?

15 COMMISSIONER GENE N. LEBRUN (South Dakota): I
16 do not believe that is correct. If the substitute
17 motion is adopted, it has been adopted. You don't vote
18 on it again.

19 CHAIRMAN LEINENWEBER: Aren't we voting on
20 whether we should amend the motion?

21 COMMISSIONER LEBRUN: No. The amendment
22 actually strikes the motion that is on the floor if
23 it's passed. If it doesn't pass, then you're back to
24 the original motion. But if the substitute motion
25 passes, it has in effect eliminated the first motion.

1 CHAIRMAN LEINENWEBER: It has, but we have not
2 adopted that one as such, as I understand it, unless
3 you're telling me that I am wrong.

4 COMMISSIONER LEBRUN: My understanding -- the
5 substitute motion and your reference earlier that it
6 really isn't a motion to amend it, it's a matter of
7 semantics. But since the substitute motion completely
8 guts the original motion, there is nothing further to
9 vote on in the original motion.

10 CHAIRMAN LEINENWEBER: That's correct. But
11 then we still have to vote on the substitute motion,
12 don't we? You tell me what it is. You are the
13 parliamentarian.

14 COMMISSIONER LEBRUN: Let me take a look at
15 Roberts.

16 COMMISSIONER JACK DAVIES (Minnesota): Mr.
17 Chairman, I think the issue can be sharpened and
18 Commissioner Lebrun's judgment be confirmed if I ask
19 that the motion be divided so that all of whereases are
20 eliminated for the time being and all we are talking
21 about now is the guts of Mr. Baggett's motion, which is
22 that the committee be instructed to go on with its
23 work, including Article V. Now, I am going to ask for
24 that division. Then I think that the motion you would
25 be putting is that guts question. Then it would

1 remain, if it passed, all the whereases that went
2 before it.

3 CHAIRMAN LEINENWEBER: I believe that that
4 would resolve -- Commissioner Lebrun, is that a . . .

5 COMMISSIONER THOMAS J. MCCrackEN, JR.
6 (Illinois): The substitute motion is a complete motion
7 in and of itself, according to Roberts. If you vote on
8 the motion to substitute, you effect -- or, in effect,
9 adopt the motion on its merits. It's a single roll
10 call on a substitute motion.

11 COMMISSIONER BERNARD HELLRING (New Jersey):
12 Mr. Chairman, I agree with the remarks just made, and I
13 agree with Mr. Lebrun as to the parliamentary
14 procedure.

15 I repeat that my confidence in the defeat of
16 the substitute motion is so great that I urge the
17 question, and I call for the question,

18 CHAIRMAN LEINENWEBER: All right. Well, let's
19 see, we have to have --

20 COMMISSIONER PETER F. LANGROCK (Vermont):
21 Parliamentary inquiry.

22 CHAIRMAN LEINENWEBER: There are several
23 parliamentary inquiries still on the floor.

24 Commissioner Lebrun, there is a request to
25 divide the question. Is that in order? There have

1 been suggestions that it's not, but you are the
2 parliamentarian.

3 COMMISSIONER LEBRUN: The chair decides
4 whether or not it's divisible.

5 [Laughter]

6 CHAIRMAN LEINENWEBER: I am going to rule that
7 it is divisible, so there will be two questions. One
8 is whether or not that we should, in effect, reconsider
9 Article V. Secondly, once that decision, if that
10 decision is made, then what form that final
11 consideration should be. I think otherwise you would,
12 in effect, be instructing the --

13 Commissioner Baggett, point of order?

14 COMMISSIONER BRYCE A. BAGGETT (Oklahoma): No,
15 Mr. Chairman, not a point of order. I think a proper
16 division of the question, I would suggest to the chair,
17 is should the committee be instructed to continue
18 working on Article V.

19 CHAIRMAN LEINENWEBER: Isn't that the same
20 result as defeating the main motion?

21 COMMISSIONER PETER F. LANGROCK (Vermont): I
22 would request the mover to withdraw the motion and let
23 us try to defeat the present motion, the main motion
24 pending. I think we would have the same result and it
25 would be a lot cleaner, parliamentary-wise.

1 CHAIRMAN LEINENWEBER: Back to Commissioner
2 Baggett, do you accept that, sir?

3 COMMISSIONER BAGGETT: I accede to the
4 request, but that will leave the record as I am the
5 only one who wants the Bill of Rights in here.

6 COMMISSIONER LANGROCK: We're back to the main
7 motion.

8 CHAIRMAN LEINENWEBER: The main motion -- the
9 gentleman has withdrawn the substitute motion. The
10 main motion is whether or not, which is by Commissioner
11 Gibson, is whether Article V should be deleted from the
12 draft of the revision of the Uniform Controlled
13 Substances Act. Are we ready for a vote?

14 "Yes" is in favor of the motion, which would
15 delete Article V. "No" would be to retain Article V,
16 and would be subject to being read, continue the
17 reading line by line in the Committee of the Whole.

18 Commissioner Jestrab.

19 COMMISSIONER FRANK F. JESTRAB (North Dakota):
20 I don't know much about controlled substances and I
21 don't know much about criminal law, but I know a little
22 bit about the policy of the conference. And it seems
23 to me that where the Drafting Committee has worked very
24 hard on an extremely important matter, one that
25 concerns a great many people -- Bryce has indicated he

1 got a letter from the President of the United States.
2 The fact that the committee is now a little bit
3 discouraged by what happened on the floor, I think it
4 is unfortunate. But the fact of the business is that
5 they do have a product. It's a product that most
6 people can live with. I think we ought to oppose the
7 motion.

8 CHAIRMAN LEINENWEBER: Commissioner.

9 COMMISSIONER ALLAN G. RODGERS (Massachusetts):
10 I wanted to inquire of the committee, some of the
11 remarks Chairman Gibson made earlier, he said, as I
12 heard it, that the committee might continue to work on
13 Article V, even during the course of this session, if
14 the committee's motion was adopted. Am I correct?

15 COMMISSIONER DAVID A. GIBSON (Vermont): What
16 would happen if this motion is adopted, we would try to
17 complete the final reading of the rest of the act, act
18 on any amendments proposed, and come back with a final
19 product which can be submitted for the vote by the
20 states on Thursday.

21 As far as continuing to work on Article V,
22 forfeiture provisions, there is no indication that the
23 committee would be in a position to do so at this time,
24 given our other responsibilities, to attend the
25 sessions of this conference, unless you wish us to work

1 nights, early mornings and through noon hours and other
2 breaks.

3 The decision on whether to proceed with
4 Article V in the future would be with the Executive
5 Committee, as to whether it felt the subject was
6 important enough to merit continued work, whether it be
7 by this committee or some other committee formed for
8 that purpose, with the questions remaining as to
9 whether forfeiture would be a freestanding act and
10 encompass other potential criminal cases, or whether it
11 would become part of the Uniform Controlled Substances
12 Act in the future. I understand that the Probate Code,
13 for example, just recently incorporated another
14 freestanding act, so that can be done in stages.

15 But as far as being able to complete any work
16 on forfeiture and return it to consideration at this
17 session, I think that is unrealistic. I don't foresee
18 that happening.

19 COMMISSIONER RODGERS: Follow-up question, if
20 I may. Has the committee taken any votes or does it
21 have any sentiment as to what its recommendation will
22 be to the Executive Committee, if the committee's
23 pending motion is adopted, as to further work on
24 forfeitures?

25 COMMISSIONER GIBSON: The sentiment of the

1 committee, and there was not a formal resolution on
2 that point, would be that forfeiture should be
3 continued to be worked on by the conference.

4 COMMISSIONER RODGERS: One follow-up comment,
5 if I may. I think it would be very unfortunate if the
6 conference abandoned the subject simply because there
7 was one group of people that seemed to feel strongly
8 that the direction which the conference was headed was
9 not to its liking. We have had many other areas and
10 issues we worked on where there has been strong
11 disagreement. I would hope that we would be able in
12 those other areas to come up with some sort of
13 solutions that, while not acceptable to all parties
14 involved, certainly we will deal with the issues in a
15 sensible way. I think it would be very unfortunate if
16 the result of the adoption of the committee's motion is
17 that the work on the forfeiture by the conference is
18 abandoned.

19 CHAIRMAN LINENWEBER: Commissioner Hellring on
20 the motion.

21 COMMISSIONER BERNARD HELLRING (New Jersey):
22 As I understand the remarks of Commissioner Gibson, if
23 the motion is adopted, the committee will urge upon the
24 Executive Committee that the act without Article V be
25 promulgated at this conference. If that is correct,

1 then I would ask, what would happen if the motion,
2 which is simply to delete Article V, is turned down,
3 based on Mr. Langrock's position and the position of
4 some of the others, with whom I agree. What would
5 happen then, Mr. Gibson?

6 COMMISSIONER GIBSON: Commissicner, we would
7 then be in a position of continuing to read the balance
8 of Article V for the conference in Committee of the
9 Whole sessions, assuming that we had sufficient time
10 given to us for that presentation during the balance of
11 our meeting this year. If we were unable to conclude
12 it at this conference, and we have no further time
13 scheduled at this present time, and there are many
14 other acts that are awaiting action by the conference
15 at this time, if we are unable to complete it this
16 year, then I assume that our committee would continue
17 to work on it between this meeting and the next annual
18 meeting, assuming there are enough resources available
19 to the conference so the committee can continue to meet
20 and work on it.

21 COMMISSIONER HELLRING: Having heard that, Mr.
22 Chairman, I urge that the motion be defeated. I do it
23 on the grounds mentioned by Mr. Langrock before me, and
24 for the reasons that I think promulgating an act at
25 this conference without the forfeiture provisions is a

1 mistake for the conference to do. The heart and soul,
2 the guts, the thing that the land is waiting for is an
3 act which contains provisions with respect to
4 forfeiture and not an act which is a eunuch. And I
5 think the act would be that without the forfeiture
6 provisions.

7 CHAIRMAN LEINENWEBER: Commissioner Deacon.

8 COMMISSIONER JOHN C. DEACON (Arkansas):

9 Commissioner Langrock in his opening remarks indicated
10 that the vote of this committee was predicated on the
11 wishes of the prosecutors, that we pull down Article V
12 because they were disappointed that it was not going as
13 they wanted. That is not so. The committee
14 independently and individually and collectively made
15 the decision that there was no practical way, at this
16 conference in Milwaukee, to finish with an Article V.
17 The committee determined that it was practical and
18 desirable to send to the states the remaining of the
19 articles so that that improvement in the law could be
20 made in the interim and that they would recommend to
21 the Executive Committee, if the time of the conference
22 permitted and the resources of the conference
23 permitted, that the committee continue after this year
24 to continue to work on a freestanding Article V.

25 So, Commissioner Rodgers and Commissioner

1 Langrock, there was not a member of the prosecuting
2 team, if you want to call it that, talked to me, or, as
3 far as I know, any other member of the committee. And
4 it was our independent judgment and it was not the
5 wishes -- if what we did was their wishes, that may be
6 one thing. But I can assure you that it was our
7 independent judgment, and not theirs.

8 CHAIRMAN LEINENWEBER: Commissioner Sullivan.

9 COMMISSIONER MICHAEL P. SULLIVAN (Minnesota):
10 I'd like to just step back for a few seconds and try to
11 get in perspective what we are supposed to be about
12 here. As I look around the body here, and I don't in
13 any way, shape or form want to put down the body, we
14 are not a truly representative group of the heart and
15 soul of this great nation of ours.

16 We are basically technicians who have got some
17 exposure, some to the legislature, some to academia,
18 some to business, some to law. And we are here trying
19 to draft these scrivener's laws that reflect the
20 current perceived needs out there of the legislatures
21 that we work for. And we are supposed to be producing
22 products on a regular basis that will fulfill their
23 needs. And to the extent that there isn't a consensus
24 and it hasn't arisen to the point where we can divine
25 what it is that is truly reflective of the legislatures

1 and truly reflective of a consensus, then there is
2 nothing wrong with backing down, because that job is
3 not ultimately our job; it's ultimately the
4 legislature's job. And it's ultimately their ability
5 to come up with approaches and develop approaches --
6 approaches in law and the philosophy -- that we can
7 grasp on to and then come up with a product.

8 And as Connie Ring pointed out, if we get to
9 the point where it's going to be difficult and we are
10 forcing through something that is not truly reflective
11 of what we divine the legislatures want, then it's not
12 appropriate. It's not appropriate for us to be forcing
13 it through, in my opinion.

14 There is an awful lot to be accomplished if we
15 can get the balance of the Controlled Substances Act
16 done. It provides a vehicle for states to work with
17 in many areas that aren't that highly controversial.

18 The forfeiture thing is highly controversial.
19 We have demonstrated it over the past few years, that
20 it's something that we can't seem to draw a bead on and
21 bring to a successful conclusion. I don't believe that
22 our inability to divine what it is that is best out
23 there should in effect put a roadblock on moving ahead
24 with any of the other considerations that we are bound
25 to do at this session, and there are a lot of other

1 acts that have to have consideration.

2 I don't believe that we are the last word on
3 the issue of what is appropriate in terms of
4 forfeiture. No one has asked my opinion at the time I
5 was sent here on that issue, and I have not been
6 elected on that issue. I don't think it's
7 inappropriate to back down at this particular time.
8 Let's do what we can in the area. Hopefully, as more
9 development comes over the next year, we can get back
10 and do a job with forfeiture, and we may conclude that
11 we can never do a job with forfeiture. That shouldn't
12 bring to a stop the work of the conference.

13 CHAIRMAN LEINENWEBER: Commissioner Henderson.

14 COMMISSIONER ROGER C. HENDERSON (Arizona):

15 Mr. Chairman, I would move to amend the motion.
16 Perhaps the committee will accept this as a friendly
17 amendment. The amendment would be as follows, that it
18 be the sense of the House that the committee continue
19 to work on Article V and report back to the conference
20 in succeeding years, and that Article V still be
21 considered a part of this act.

22 I think that will relieve some people's fears
23 that somehow or other this would drop between the
24 slats, that we would never see it again, or that it
25 might become a freestanding act. I think that if we do

1 not proceed on all the articles, with the exception of
2 Article V, what is going to happen, and it's already
3 happening out there, states will start to adopt what we
4 have worked on, but there are going to be amendments to
5 it because it does not have the imprimatur of the
6 conference on it. Once you get in the legislative
7 process, you cannot say: Don't change this because it
8 ought to be uniform. People will say, as far as
9 Articles I through IV and VI and VII, the conference is
10 still working on it. In fact, some states have already
11 adopted what we have done, I through IV and VI and VII.
12 There is no way to stop that.

13 If we can get that out there with the current
14 amendments that have been proposed, a final product on
15 those articles, and if the committee and the conference
16 understand that they will come back in succeeding years
17 on V until we get that worked out, then we will have
18 that. But if the states go on and continue to adopt
19 this product, which we haven't finalized, then you are
20 going to have an even more difficult time, once we do
21 finalize the product, of getting it enacted because the
22 people are going to say, "We have got other things to
23 consider and we have got this and it's working."

24 I would urge that the committee's motion be
25 amended so that we understand that this would be a

1 continuing part of the Uniform Controlled Substances
2 Act, and that we then pass the motion as amended.

3 CHAIRMAN LEINENWEBER: Commissioner Bugge.

4 PRESIDENT BUGGE: With all due respect to
5 Commissioner Henderson's remarks, if the motion passes
6 to delete Article V, it seems to me -- and we act
7 finally on the act at this conference, the Uniform
8 Controlled Substances Act will be the -- as the act
9 without an Article V, and this committee will become a
10 standby committee, and it would not and cannot exist to
11 be instructed to undertake further work on forfeiture.

12 However, the Committee on Scope and Program
13 and the Executive Committee can and will consider
14 recommendations to continue work on the forfeiture
15 issue if that is the recommendation of any
16 commissioner, and, indeed, hear today that it will be
17 the recommendation of many commissioners. And whether
18 that project should be undertaken by the conference and
19 then perhaps later incorporated into the promulgated
20 UCSA is another subject. We took action like that at
21 this meeting, as you recall, by incorporating into the
22 Uniform Probate Code the freestanding act on the Rule
23 Against Perpetuities. So, it certainly is within the
24 realm of possibility that a uniform forfeiture act
25 drafted by this or another committee over the next few

1 years could also be so incorporated into UCSA as well
2 as being promulgated as a freestanding act.

3 It seems to me the posture of this particular
4 project is where it was two years ago in Washington.
5 It was a completed project. We thought it was there
6 for final reading when the prosecutors and the attorney
7 generals said, "we need the imprimatur of the
8 conference on forfeiture provisions, as well as needing
9 the updated criminal provisions of this act," and we
10 attempted -- I think, valiantly -- on behalf of this
11 committee to accommodate that expressed need, both at
12 that conference and over the next two years, to achieve
13 a section on forfeiture that would satisfy the
14 interested parties. We have not done so. The
15 committee has not yet done so, by reason of the action
16 of this house on the floor.

17 We cannot, I am sure, at this meeting, with
18 due regard to the other acts awaiting final approval
19 and first reading, very important acts and products of
20 this conference, undertake to give this project more
21 time at this meeting if this motion fails, if this
22 motion to delete Article V fails. If it fails, the
23 committee will not have additional floor time to read
24 Article V. It will be up to the Executive Committee, I
25 guess, and the leadership of the conference to

1 determine what resources of the conference will be
2 devoted to the project over the next year or two years,
3 if that should be necessary.

4 On the other hand, if this motion passes, I
5 think the committee's work will be done, assuming the
6 other remaining articles can be promulgated as UCSA,
7 and then the issue of forfeiture can be considered
8 separately.

9 CHAIRMAN LEINENWEBER: Before I try to restate
10 the motion, Commissioner Henderson, do you wish to
11 persist with it?

12 COMMISSIONER HENDERSON: It sounds to me like
13 it was out of order. But if you technically want it
14 withdrawn, I will.

15 CHAIRMAN LEINENWEBER: The motion is
16 withdrawn.

17 Back on the motion, Commissioner Mielke.

18 COMMISSIONER DONALD E. MIELKE (Colorado): I
19 would urge a "yes" vote and follow the committee's
20 instructions because I think the conference needs to
21 look at what has happened historically, and to follow
22 Commissioner Sullivan's comments, what happened in
23 Washington, what happened in Honolulu. We have a great
24 product in Articles I through IV, and now, with some
25 minor changes, in VI and VII to send to the states.

1 I, for one, asked that that be promulgated
2 last year after Honolulu -- that, in fact, we should
3 send out something because there is a crying need out
4 there. Look at what the conference did in Washington
5 and in Honolulu in analogs, the designer drugs. Look
6 at the definitions in the first 103 pages of what we
7 have drafted already over the past four years. Those
8 104 pages have a great need out there as far as what it
9 states, the imitation controlled substance, the turkey
10 drugs, the counterfeit drugs, the sections on
11 continuing criminal enterprise, the money-laundering
12 sections. All these things we did for the past two
13 years are in there. It's a very good act as it stands.
14 Without it, the states would not have even definitions
15 in cocaine, isomers of cocaine and some other areas
16 that the feds have picked up in the federal Controlled
17 Substance Act. Those sections need to be promulgated
18 by this conference.

19 If I heard President Bugge's comments
20 correctly, without passing this motion, they will delay
21 another year and the states will not have that portion
22 which we should send to them. I would urge an "aye"
23 vote.

24 CHAIRMAN LEINENWEBER: Commissioner Langrock
25 on the main motion.

1 COMMISSIONER PETER F. LANGROCK (Vermont): I
2 think the president has put the issue quite clearly,
3 that either we are going to send an act out that is a
4 complete act or we're not going to, that we are going
5 to have an act that goes out without a forfeiture
6 provision.

7 He has also indicated that if we are going to
8 have a complete act, it may take another year. So be
9 it. This is not something -- I think I raised this the
10 first few minutes of the conference.

11 I do take issue with Mike and Connie's
12 comments that we have had debate on the floor on this
13 issue of forfeiture before. We certainly didn't last
14 year. We didn't have any meaningful debate the year
15 before.

16 What we have here is the first time the
17 substantive issues surrounding forfeiture have come
18 before the floor. I do think we have a consensus. I
19 think the votes on Saturday were quite clearly telling
20 the committee where the conference comes out. I don't
21 think that we are a group -- merely a sieve to come to
22 some compromise conclusion which makes everybody happy.
23 We are a group to exercise leadership in drafting,
24 leadership in thought. I think that we can put a good
25 forfeiture statute out.

1 You know, it just seems to me that -- we have
2 got the 1973 Act. It's been out there. It has a
3 forfeiture provision. For us to come out and say now
4 that there is no forfeiture provision in our act, we
5 have a complete act without it, I think looks
6 ludicrous. What it really is, is an open invitation to
7 whatever pressure groups there are to substitute their
8 own forfeiture provisions when they go to the
9 legislature. I think it's going to have problems in
10 the ABA. I think the ABA will say: Where is the
11 forfeiture? We have to wait for it until we see what
12 the forfeiture looks like.

13 I want to take one other personal situation,
14 and I'm sure Dave didn't mean it, at least I hope he
15 didn't mean it directing it at me, in terms of delay.
16 I would like to see a good act. I would like to see a
17 balanced act which protects the rights of our citizens
18 and also gives whatever tools that are needed in terms
19 of criminal prosecution. I don't want to see an
20 unbalanced act. I have never in this conference
21 deliberately tried to delay any matter. I am trying to
22 put together, from my philosophic standpoint, a solid
23 act, and I think we all did here Saturday. This was
24 not dilatory in any way.

25 This is a tough issue. I wish we would spend

1 the time we are talking here about procedural
2 matters -- how to go on the substance. I wish we would
3 take the time, go back and read it. The committee can
4 draft this. The committee just has not had a chance to
5 respond to where the conference is at this point.

6 I really urge you to defeat this motion.

7 CHAIRMAN LEINENWEBER: Commissioner Jestrab.

8 COMMISSIONER FRANK F. JESTRAB (North Dakota):

9 I am going to do something I haven't done in 34 years
10 in this house, and I am going to change my mind.

11 [Laughter]

12 COMMISSIONER JESTRAB: After I have listened
13 to our president and after I listened to Mike Sullivan,
14 I am convinced that we ought to support the motion.
15 The committee has told us what they can do. Of course,
16 we may know better, never having been on the committee,
17 which is often the case; the less you know about it,
18 the more you know. But I think they have made it quite
19 clear that they don't want to proceed with Article V.
20 They have covered a great deal of territory. They have
21 done it with skill and knowledge. It seems to me that
22 to abandon what is possible, in hope of perfection, is
23 dumb.

24 I would urge the house to support the motion.

25 CHAIRMAN LEINENWEBER: The commissioner on my

1 far left.

2 COMMISSIONER THOMAS A. BOLT (Virgin Islands):
3 I would respectfully offer an amendment in the nature
4 of a substitute, that we delete Article V and that the
5 existing bill be amended, the existing act be amended
6 on Page 153, Line 20, by deleting the strikeouts from
7 153, Line 20, through Page 157, Line 25.

8 I so move.

9 CHAIRMAN LEINENWEBER: I didn't catch the last
10 part. 153, Line 20, deleting the strikeouts, and what
11 else?

12 COMMISSIONER BOLT: Through 157, Line 25.

13 This would effectively keep forfeiture within
14 the Uniform Controlled Substances Act as was adopted
15 earlier by the conference in 1970.

16 CHAIRMAN LEINENWEBER: All right. As I
17 understand the motion, the motion is to amend the main
18 motion by deleting the strikeouts -- was it the same
19 section, Article V, the forfeiture, restoring the old
20 forfeiture provisions of the 1973 act, and deleting the
21 proposed changes. Is that correct, Commissioner?

22 COMMISSIONER BOLT: Yes. We would delete
23 Article V as the committee has recommended, and we will
24 then return to the present forfeiture provisions.

25 CHAIRMAN LEINENWEBER: All right. Is there

1 discussion from the committee on that motion?

2 Commissioner Gibson.

3 COMMISSIONER DAVID A. GIBSON (Vermont): The
4 committee obviously has not been polled on this
5 particular provision. In its work, however, over the
6 last five years, the committee reached the
7 determination that the old Section 505 was not really
8 appropriate for inclusion as then written back in 1970,
9 that there were a lot of different aspects to the
10 problem of forfeiture which needed to be addressed, and
11 we have tried to do so both in our presentations in
12 1987 and in the material that was to be presented to
13 the annual meeting in 1988. At least as far as this
14 commissioner is concerned, I would be opposed to the
15 friendly amendment offered by the commissioner from the
16 United States Virgin Islands.

17 I would also like to say that, on this point,
18 it seems like there is a view in some quarters that
19 forfeiture just doesn't exist out in the states if we
20 don't have something in this act. That simply is not
21 true. There are provisions from the 1970 act that will
22 remain in effect, I expect, if they're still in effect
23 in the various states. Other states have their own
24 forfeiture provisions that they may have adopted in the
25 intervening years. It's not as though we are leaving

1 things in a vacuum.

2 If we insist that this act go out with a
3 forfeiture provision, then I think we are sort of
4 letting the tail wag the proverbial dog. The more
5 important aspects to this act, in my judgment, are in
6 the other sections of law.

7 Thank you.

8 CHAIRMAN LEINENWEBER: Commissioner Fisher on
9 the question of whether or not the main motion should
10 be amended. Do you wish to speak on that, sir?

11 COMMISSIONER STANLEY M. FISHER (Ohio): Yes, I
12 do. My question really would relate to the amendment,
13 as well as the previous motion. What would be the
14 procedure, if we adopt either motion, relative to a
15 comment on Section 5 as a direction to the state? And
16 is it possible if we defeat the motion that is now
17 made, and we would then delete Section 5, to have a
18 comment of the committee directing the states to
19 recognize the concerns that we have, that have been
20 expressed by the conference as a whole, on the issues
21 of due process in adopting Section 5? What would be
22 the committee's position on that?

23 CHAIRMAN LEINENWEBER: Commissioner Gibson.

24 COMMISSIONER GIBSON: Commissioner, the
25 position of the committee would indeed be that there be

1 a comment explaining why there is no forfeiture
2 provision included in the act and to indicate the
3 various policy issues involved in that consideration.

4 CHAIRMAN LEINENWEBER: Commissioner.

5 COMMISSIONER EDWARD I. CUTLER (Florida):

6 Would the committee also think about the possibilities,
7 however obsolete, the existing forfeiture provisions,
8 existing uniform act, to propose that in brackets, that
9 that be renewed, with the idea, of course, that if the
10 state has other forfeiture provisions already in place,
11 that they would be the alternate, or at least a
12 provision that there is nothing in this act that would
13 in any way affect existing forfeiture legislation.
14 Would that help?

15 CHAIRMAN LEINENWEBER: Commissioner Gibson.

16 COMMISSIONER GIBSON: Commissioner, that may
17 be a possibility. I think it would have to be ratified
18 by this body to be a bracketed provision of the act.
19 However, it could be set out in text of the comments as
20 the existing 1970 provision on forfeiture. I do think
21 the committee would need to look at it, just to make
22 sure that if it were included as a possible addition by
23 a state legislature, if they wish to so do, that we
24 would want to make sure it was complementary to the
25 other work that the conference has done on the uniform

1 act.

2 COMMISSIONER CUTLER: I think that would carry
3 out my thought. If it's in the comment -- the old
4 provision is in the comment -- that would be sufficient
5 to enable a legislature to think about using it or some
6 modification of their own in the event the conference
7 doesn't speedily come forward with a uniform forfeiture
8 provision.

9 CHAIRMAN LEINENWEBER: Commissioner Baggett on
10 the motion to amend.

11 COMMISSIONER BRYCE A. BAGGETT (Oklahoma):
12 Ladies and gentlemen of the conference, I urge you to
13 defeat this motion. This is on the motion to amend?

14 CHAIRMAN LEINENWEBER: On the motion to amend.

15 COMMISSIONER BAGGETT: I will wait and speak
16 on the main motion.

17 CHAIRMAN LEINENWEBER: Commissioner Braun.

18 COMMISSIONER RICHARD L. BRAUN (North
19 Carolina): One other point on leaving it in or leaving
20 it sort of in brackets. Remember, every state that has
21 adopted the old uniform act has that section already.
22 When we don't replace it, it will almost certainly
23 either remain there, or they will have the option of
24 changing it themselves, which a number of them have
25 already done. If we insert it into the act, or say,

1 "Here is a section that you can continue to use," we
2 are, I think, endorsing that act, or Section 505.

3 I don't believe we should at this point
4 endorse or criticize the present Section 505, but leave
5 it as it is until we can get the new one out with the
6 notice in the comment to the states that if it's
7 already in existence and they wish to keep it, they can
8 do so.

9 CHAIRMAN LEINENWEBER: Commissioner Hellring,
10 on the motion to amend the main motion.

11 COMMISSIONER BERNARD HELLRING (New Jersey):
12 On that motion to amend, I urge that it be defeated for
13 the reasons just stated, as well as the fact that it
14 will give the wrong message entirely if the motion to
15 amend were adopted.

16 CHAIRMAN LEINENWEBER: The motion from the
17 commissioner from the Virgin Islands, as I understand
18 it, is as follows: That the new language in Article V
19 be stricken and that the deleted language found on Page
20 153, Line 20, through 157, Line 25, that the deleted
21 language be restored, the effect of which will be to
22 substitute the 1973 forfeiture provisions for any of
23 the new materials.

24 All those in favor, signify by saying "aye."

25 All those opposed, "nay."

1 [Motion failed]

2 CHAIRMAN LEINENWEBER: Are we ready for the
3 main question, which is to strike Article V? All those
4 in favor -- excuse me, Commissioner Baggett on that
5 motion.

6 COMMISSIONER BRYCE A. BAGGETT (Oklahoma):
7 Ladies and gentlemen of the conference, I beg you to
8 defeat this motion. If you will think for just a
9 minute, you will see why you should. We are about to
10 shoot ourselves in the foot. Last Saturday, the debate
11 and the actions taken by this conference on the floor
12 reflected a growing consensus that this subject has
13 been handled in the wrong way by this drafting
14 committee and that a different approach needs to be
15 taken. It is, therefore, predictable that if this
16 conference works its will, we will rewrite Article V.

17 Understandably, the committee doesn't like the
18 direction we are going, so they want to separate it
19 out. That will defeat the will of this conference as
20 expressed last Saturday.

21 Now, we are a captive of our history. We have
22 recommended forfeiture provisions to the states.
23 They're out there. They're our child. We produced it.
24 We can't ignore our responsibility with respect to it.
25 We are responsible for what we created and recommended

1 to the states. We made some mistakes. It's time to
2 correct them. We have had 20 years of experience.

3 We cannot, like Pontius Pilate, wash our hands
4 of this thing. Our hands are covered with gore, blood
5 and bones of people who are ground up on what we have
6 created.

7 Many states have taken what we created 20
8 years ago and amended it with the provisions that this
9 Drafting Committee has been promulgating. Several
10 states, including my own, have already adopted the
11 provisions that we are criticizing, because the
12 imprimatur -- or however you pronounce that lovely
13 word -- of this conference is of great value. We don't
14 seem to appreciate how great it is. The President of
15 the United States is asking for it. The Attorney
16 General is asking for it. Don't we recognize what we
17 hold in our hands?

18 Now, leadership develops a point of view. We
19 have heard from our president, Mr. Bugge, from our past
20 president, Mr. Sullivan, from Connie Ring, from Mr.
21 Henderson, from others, that we don't have time to do
22 this business, and what our function is. Mr. Bugge
23 suggested, Mr. Sullivan suggested that we are respected
24 out there as technicians, that the legislatures respect
25 us as technicians and that we can take a technical act.

1 like probate and do a good job with it, but that we are
2 not respected as grand policy makers on a macro scale.

3 Gentlemen, their positions of leadership have
4 narrowed their vision too small. We are respected
5 throughout the 50 states as policy makers on the great
6 issues. And as to the Bill of Rights, the greatest of
7 issues to any citizen of this United States, this
8 conference's imprimatur is of great importance.

9 The President wants it to bless his war on
10 drugs. The Attorney General wants it to bless his
11 President's war on drugs. And by not deciding, you
12 decide. You can't wash your hands of this one. What
13 we do even by not doing will count. This baby has come
14 home to us and is our responsibility.

15 CHAIRMAN LEINENWEBER: Commissioner Hellring.

16 COMMISSIONER BERNARD HELLRING (New Jersey): I
17 do not share Commissioner Baggett's psychoanalysis of
18 the committee's thinking. I have listened to the
19 debate, of course, and to the remarks of our president,
20 Lawrence Bugge, as well the remarks of Mike Sullivan.

21 I join my colleague, Frank Jestrab, in
22 changing my mind. I urge that the motion be adopted as
23 promulgated by the committee, as suggested by the
24 committee. I now believe that although the ABA House
25 of Delegates may have difficulty in adopting and going

1 along with the proposed act without the forfeiture
2 provisions, and even though the attorney generals may
3 be disappointed in not having a finished product,
4 including the forfeiture provision, that they will
5 understand that that provision which is so crucial and
6 so central to the act is very difficult to promulgate,
7 and that the conference will go forward to do that in
8 its time as quickly as possible, perhaps during the
9 next year, and that the rest of the act be promulgated.

10 CHAIRMAN LEINENWEBER: Commissioner --

11 COMMISSIONER BRYCE A. BAGGETT (Oklahoma): I
12 did not yield the floor, Mr. Chairman.

13 CHAIRMAN LEINENWEBER: I thought you had
14 concluded your remarks.

15 COMMISSIONER BAGGETT: I don't know why you
16 thought it. I didn't sit down or leave the microphone.

17 CHAIRMAN LEINENWEBER: Proceed.

18 COMMISSIONER BAGGETT: Forfeiture is 90
19 percent of this act as far as its importance to the
20 people of these United States. The technical
21 amendments which have been made in the other portions
22 of the act and the substantive amendments are of value
23 and of importance. But on a relative scale, they're
24 very small. We could go forward with them and
25 promulgate them. But to fail to speak on forfeiture is

1 to send a message itself.

2 Now, I don't know what mood was prevailing
3 among the commissioners on Saturday. I was not here.
4 I arrived late and apologize for that. But this
5 conference on Saturday reacted to the committee's draft
6 to reject some of the principles, to express other
7 principles. If that is the way the commissioners are
8 seeing it, we need to proceed with that work. This
9 motion will short-stop that work.

10 Great things are afoot in this land. This is
11 our baby. We cannot wash our hands and walk away from
12 it so easily, because doing that is a message, too.
13 And it's the wrong message.

14 CHAIRMAN LEINENWEBER: Commissioner Bush.

15 COMMISSIONER JAMES M. BUSH (Arizona): Mr.
16 Chairman, we have had this motion under debate for the
17 better part of an hour and a half. There have been
18 eloquent and good addresses made on behalf of both
19 sides. I doubt that spending more time is going to
20 change the minds of any commissioners.

21 I move the previous question.

22 CHAIRMAN LEINENWEBER: The previous question
23 has been moved.

24 All those in favor, signify by saying "aye."
25 Opposed.

1 The motion is on the question proposed to the
2 committee by Commissioner Gibson, and that is to
3 strike -- Article V be deleted from the draft review of
4 the Uniform Controlled Substances Act.

5 All those in favor, signify by saying "aye."

6 All those opposed.

7 The "ayes" have it.

8 A COMMISSIONER: Division.

9 CHAIRMAN LEINENWEBER: Division has been
10 requested.

11 All those in favor of the motion, please rise.

12 The chair is not in doubt. The motion
13 carries. Article V is deleted.

14 We will proceed with the reading of Article
15 VII. I believe when we left off, to be read was
16 Section 705.

17 COMMISSIONER JACK DAVIES (Minnesota): Mr.
18 Chairman, is the effect of that last motion that V
19 disappears and the sections will now be re-numbered?

20 CHAIRMAN LEINENWEBER: I believe they will now
21 be re-numbered. But for purposes of your books, we
22 will continue to use the old numbers.

23 COMMISSIONER DAVID A. GIBSON (Vermont):
24 Section 705, Page 166 of your draft.

25 "SECTION 705. UNIFORMITY OF INTERPRETATION.

1 This [Act] must be so applied and construed as to
2 effectuate its general purpose to make uniform the law
3 with respect to the subject of this [Act] among states
4 enacting it and to complement the policy of the federal
5 Controlled Substances Act and of international
6 treaties, conventions, or protocols to which the United
7 States is a party which recognize that the medical and
8 scientific use of controlled substances is essential to
9 public health and welfare and that their availability
10 for these purposes must be assured, but that the
11 illegitimate manufacture, distribution, and possession
12 of controlled substances is a threat to public health
13 and welfare and must be prohibited."

14 CHAIRMAN LEINENWEBER: Discussion on 705.
15 Commissioner.

16 MR. DAVID D. BIKLEN (Connecticut): Could I
17 ask the committee if they would consider redrafting
18 Lines 5 through 14 in a way which makes it somewhat
19 more understandable. I tried to put it together and
20 wasn't very successful. I would like to ask the
21 committee if they would spend a little bit of time
22 doing that, perhaps with numbers or subsections.

23 For instance, on Line 6, it seems to me that
24 Line 6, before the word "federal," one might go, on
25 Line 7, before the word "international," two, and then

1 the "which" on Line 8 I think goes back to both one and
2 two. Then on Line 8, I think the "that" at the end of
3 the sentence is another subsection like an (a). Then
4 there is something that seems to be similar to that on
5 Line 11, the "but" -- it's hard to read that and
6 understand all of these various clauses and where they
7 would refer. I would ask the committee if they'd go
8 back and redraft it in a more comprehensive way.

9 COMMISSIONER DAVID A. GIBSON (Vermont): We
10 would be glad to take that comment under advisement.
11 We will take another look at it.

12 CHAIRMAN LEINENWEBER: The commissioner on my
13 right.

14 COMMISSIONER JAMES C. MCKAY, JR. (District of
15 Columbia): The language starting with "which"
16 shouldn't be in this clause. It's basically a purpose
17 clause. It certainly should not be in the uniformity
18 of interpretation clause which is just the boilerplate
19 clause that we have in all conference acts. I would
20 suggest the committee separate it out. Of course, we
21 have a general drafting rule against purpose clauses,
22 but it's possible to have them in some cases. But it
23 doesn't make any sense as the uniformity of an
24 interpretation. I am wondering what the committee
25 thinks.

1 CHAIRMAN LEINENWEBER: Do any of the
2 commissioners wish to respond to that. I guess it's a
3 suggestion that you review it. They're going to review
4 it anyway.

5 Commissioner Rodgers.

6 COMMISSIONER ALLAN G. RODGERS (Massachusetts):
7 I just wonder why it's there at all. What is the
8 committee's intent behind having this language there?

9 COMMISSIONER GIBSON: The intent of the
10 committee in having this language here is to emphasize
11 the fact that the states do not operate in a vacuum in
12 this field and that it is not strictly a punitive or
13 criminal act. We want to make sure that appropriate
14 treaties of the federal government and appropriate
15 adherence to federal law is recognized, and that has to
16 be consistent with that given the interstate character
17 of drug manufacture, drug distribution and so forth.

18 We also want to make sure that in our
19 presentation of the various control measures, that
20 proper medical treatment, proper use of controlled
21 substances not be discouraged. There is a reality in
22 the medical profession that to the extent one controls
23 and imposes restrictions on the dispensation of
24 medications for proper treatment of patients, that
25 physicians will begin to prescribe other medications

1 that may be less helpful in dealing with a particular
2 patient's illness. We want to make sure the act is so
3 construed that it does not inhibit the appropriate
4 medical practice and the proper use of controlled
5 substances.

6 CHAIRMAN LEINENWEBER: The commissioner on my
7 far right.

8 COMMISSIONER ROBERT J. TENNESSEN (Minnesota):
9 To follow up on that question, is the committee's
10 intent that the interpretation of the state statute by
11 this provision incorporates interpretations of the
12 federal statute in cases where you may say that the
13 Controlled Substances Act applies? In this case where
14 you have a state prosecution, is it your intent that
15 the interpretation of the state statute, if it is
16 different from the federal, that this would make it
17 conform to the federal, and therefore the person would
18 in effect be prosecuted under the federal statutes
19 rather than state statutes?

20 COMMISSIONER GIBSON: No, we don't intend it
21 to go that far. All we are saying is that any handling
22 of this act by the various states would be to
23 complement the policy of the federal Controlled
24 Substances Act. It's a far cry from saying that they
25 have to follow any decisions of the federal courts that

1 may have been interpreting it.

2 COMMISSIONER TENNESSEN: What does that mean?

3 COMMISSIONER RICHARD L. BRAUN (North
4 Carolina): It means they're encouraged to follow, but
5 not necessarily required. In other words, they're free
6 to make their own interpretations, but we hope there
7 will be some uniformity of interpretation.

8 CHAIRMAN LEINENWEBER: Commissioner Baggett.

9 COMMISSIONER BRYCE A. BAGGETT (Oklahoma): I
10 move to amend the section, Line 5, by placing a period
11 after the word "it" and striking the balance of the
12 language.

13 CHAIRMAN LEINENWEBER: The motion is to amend
14 Section 5 by placing a period after the word "it" on
15 Line 5 and striking the balance of that paragraph. Did
16 I accurately state the motion, sir?

17 Is there discussion from the committee?

18 COMMISSIONER GIBSON: For the reasons stated
19 in response to the questions posed by other
20 commissioners, the committee feels that it's important
21 to retain this language in this section, and we would
22 oppose the motion.

23 COMMISSIONER BAGGETT: May I explain my
24 motion?

25 CHAIRMAN LEINENWEBER: You may explain your

1 motion.

2 COMMISSIONER BAGGETT: The usual provision of
3 this conference as to the construction of the act is
4 complete with the word "it" in Line 5. The language
5 thereafter is highly unique. I don't know of any other
6 uniform act we have promulgated that contains any
7 provisions of this nature. Ordinarily, judges in
8 construing and interpreting an act look to the language
9 of the act itself for guidance and help in
10 understanding its meaning and purpose. This tells them
11 to look at a federal act, at international treaties,
12 protocols and conventions, and a whole lot of other
13 things. We didn't even get a clear answer as to what
14 it is they're to look at. Not knowing what it is, I am
15 concerned, and I prefer to stick with the conference's
16 traditional language.

17 COMMISSIONER REID C. PIXLER (Colorado): If I
18 could address this for a moment. Substantially, this
19 language, particularly below this section that
20 Commissioner Baggett is concerned with, was really
21 drafted and presented to the committee by Dave
22 Joranson.

23 Part of the concern here is to make it clear
24 that this act isn't any attempt to inhibit or make
25 unavailable the legitimate medical uses of controlled

1 substances and make them available for things like
2 intractable pain. There are other sections where this
3 is dovetailed. This is a salutary comment trying to
4 give some direction, as the other commissioners have
5 said.

6 It's not to create any trap or to create any
7 harm that is anything other than a laundry list of all
8 the concerns that are being addressed by the act. And
9 to suggest other places where people can find language
10 from cases or treaties that they may need to be
11 incorporating into their efforts to prosecute drug
12 trafficking that may cross an international boundary --
13 I don't think there is anything harmful in that
14 language.

15 CHAIRMAN LEINENWEBER: Commissioner, on the
16 motion.

17 COMMISSIONER EUGENE A. BURDICK (North Dakota):
18 I think that the language, if it's retained, should be
19 relocated. It has no place in this boilerplate
20 provision.

21 My main objection to it is that it is
22 mandatory that this be construed to complement these
23 other unknown policies. This is a mandatory provision
24 which I think is highly objectionable.

25 CHAIRMAN LEINENWEBER: Further discussion on

1 the motion?

2 COMMISSIONER PETER J. DYKMAN (Wisconsin): I
3 support the motion. The language that I hope is
4 deleted by this motion is in violation of Rule 22 on
5 purpose clauses. This is just a sneaky way to take
6 something that is really a purpose clause and stick it
7 back somewhere in the bill.

8 The reason that the drafting rules prohibit
9 purpose classes is the mandatory nature, but also the
10 confusing nature that this will send a different
11 message than what is in the act. We have had many
12 times in Wisconsin and other states, you have a purpose
13 class that says one thing and you have the act saying
14 another thing, and you cause confusion. Therefore, I
15 support the motion. I hope it is deleted.

16 CHAIRMAN LEINENWEBER: On the motion.

17 COMMISSIONER FRED H. MILLER (Oklahoma): With
18 all deference to my colleague from Oklahoma, I think he
19 overlooks that this may be perhaps moved as
20 Commissioner Burdick suggests as a mainstay provision
21 in the Uniform Commercial Code. And while it's not as
22 popularly enacted as the code in the Consumer Credit
23 Code in his own state -- so I don't think this violates
24 any conference tradition if properly put in as a clause
25 in the beginning to indicate to the courts the purposes

1 of the act and why it should be construed in conformity
2 with that.

3 PRESIDENT SULLIVAN: Commissioner Bonfield on
4 the motion.

5 COMMISSIONER ARTHUR E. BONFIELD (Iowa): It
6 seems to me that because it's mandatory, I object to it
7 because I think it raises serious undue delegation of
8 legislative power issues, because what in effect it
9 says is that the courts of the state applying it are
10 required as a matter of law --

11 CHAIRMAN LEINENWEBER: Commissioner, the
12 committee has said that they will make it permissive
13 when they rewrite the act.

14 Are we ready for the question?

15 Commissioner, on the motion.

16 COMMISSIONER JAMES C. MCKAY, JR. (District of
17 Columbia): Wouldn't a better solution be to put that
18 language in the comments, but not have it in the actual
19 language of the statute?

20 COMMISSIONER DAVID A. GIBSON (Vermont):
21 Initially that is where we were going to go with it,
22 but then it became clear to the committee that it was a
23 very important matter and that it would probably get
24 lost in the comment, which is not always printed when
25 states adopt the uniform act. That is why we decided

1 to dignify it by including it as a main part of the
2 act.

3 COMMISSIONER MCKAY: I would move to amend the
4 motion to -- instead of deleting it, to incorporate it
5 in the comments, but not to delete it totally from the
6 act.

7 CHAIRMAN LEINENWEBER: There is a motion to
8 amend the main motion. The main motion was to strike
9 most of the language of 705, most of the new language
10 in Section 705. The amendment to the motion is to put
11 the material in the -- instruct the committee to put
12 the material in the comments and delete it from the
13 text.

14 Commissioner Baggett on the amended amendment
15 to his motion.

16 COMMISSIONER BRYCE A. BAGGETT (Oklahoma): I
17 would object to the amendment because it's not an
18 amendment, it's in opposition to my motion. I just
19 want to strike it out of the statute. Where the
20 committee puts it, I've got some ideas and they have
21 got some ideas. And they can put it where they want
22 to. I just don't want it in the statute.

23 [Laughter]

24 CHAIRMAN LEINENWEBER: The motion is on the
25 amendment. Are we ready for that? Amend the motion by

1 moving the material from Section 705 and place it in
2 the comments.

3 All those in favor, signify by saying "aye."

4 All those opposed.

5 The motion to amend fails. Back to the main
6 motion.

7 All those in favor of the motion --

8 COMMISSIONER MILLARD H. RUUD (Texas): I have
9 a suggestion. I think in Line 14 you really ought to
10 add "safety." The drug business kills innocent people.
11 A person on drugs is financing a habit by robbery and
12 mugging and so on. It's more than health and welfare
13 involved. Safety is also involved. I suggest that. I
14 won't offer it as an amendment, but I gather the
15 committee can --

16 CHAIRMAN LEINENWEBER: The motion is --

17 MR. DAVID JORANSON: Mr. Chairman, may I be
18 permitted to speak?

19 CHAIRMAN LEINENWEBER: Yes.

20 MR. JORANSON: I was the one who suggested
21 this, along with support from a number of
22 organizations. I would like to take a moment to
23 clarify our purposes in recommending this language.

24 First of all, in recommending it, the
25 committee initially decided that it should be in a

1 ccomment. However, as the problems in the way in which
2 controlled substances are being not used for medical
3 practices and are being increasingly shied away from by
4 patients in this country because they are getting the
5 message that controlled substances are only risky and
6 have very little benefits, it was felt by the committee
7 that it was important enough to put into the statutory
8 language at some place.

9 We struggled with the question of where to put
10 it, because the conference's drafting rules do not
11 permit, apparently, purpose clauses. And as a
12 consequence, it landed in the uniformity of
13 interpretation section.

14 One of the things that I -- not being a
15 lawyer, I can't instruct you in, but I am aware that
16 the single convention on narcotic drugs, to which the
17 United States is a party, as well as the psychotropic
18 convention to which the United States is a party, both
19 have a dual purpose. The dual purpose being to ensure
20 the availability of controlled substances for
21 scientific and medical purposes and to prohibit their
22 nonmedical use. The federal Controlled Substances Act,
23 as Mr. Harbin can assure you additionally, includes
24 precisely this dual purpose. And it's stated in a
25 preamble section, which apparently, again, according to

1 the drafting rules, would not find its way into this
2 act.

3 The 1970 Uniform Controlled Substances Act,
4 apparently due to drafting rules, did not contain this
5 dual purpose. As a consequence, the uniform act which
6 has been promulgated to the states for the past 20
7 years has lacked an important element of balance
8 between the medical and scientific uses of controlled
9 substances on the one hand, and their risks and abuse
10 potential on the other. This is an attempt as a matter
11 of policy to give notice to the people in the states
12 that, in fact, controlled substances have essential
13 medical benefits that should not be overlooked and that
14 the efforts to deal with the drug abuse problem may not
15 interfere with their availability to physicians and
16 patients for medical care.

17 CHAIRMAN LEINENWEBER: Commissioner Burdick.

18 COMMISSIONER EUGENE A. BURDICK (North Dakota):
19 I am in favor of the motion. However, I think this
20 could be better handled and accomplish everything that
21 the gentleman from Wisconsin just stated if we had a
22 provision that simply said this act does not preclude
23 or prevent the use of controlled substances for medical
24 purposes, dah-dah-dah, under dah-dah-dah treaty or
25 dah-dah-dah statutes and things like that. You get

1 your policy in by simply saying that the act does not
2 preclude those considerations. But to make it a
3 mandatory or hortatory suggestion that the act be
4 construed to harmonize like that, I think it's going
5 too far. I would support the motion to delete it, but
6 give the committee the opportunity to draft a section
7 that is a nonprecusory aspect.

8 CHAIRMAN LEINENWEBER: Are we ready for the
9 motion?

10 COMMISSIONER PETER J. DYKMAN (Wisconsin): I
11 am really very upset with this. What this is doing is
12 something that has happened in Wisconsin. I heard what
13 the adviser has said.

14 In Wisconsin a number of years ago, there was
15 a study committee. They had a major policy issue
16 involved in it. They took a vote on it. One side won.
17 As a part of the compromise, the other side got the
18 note, the comment. You can imagine what the Supreme
19 Court of Wisconsin thought about trying to figure out
20 what that did. That is exactly what this did. The
21 adviser has lost out. This act is not as he says it
22 is. It's what we have been talking about all the time
23 here. He didn't get what he wanted in this act. This
24 act does not speak as he speaks. This, right here,
25 does not speak as that. It's a real conflict. It

1 tells the courts and the prosecutors they can follow
2 the act or they can follow this intent statement. That
3 is why the intent statement shouldn't be in here. I
4 hope that the motion is supported.

5 CHAIRMAN LEINENWEBER: The motion is, on Line
6 5, Section 705, Page 166, to insert a period after the
7 word "it," strike all remaining language.

8 All those in favor, signify by saying "aye."

9 All those opposed.

10 The chair is in doubt. All those in favor,
11 please rise.

12 All those opposed.

13 The motion carries. The language is stricken.

14 Further discussion on Paragraph 705.

15 Commissioner.

16 COMMISSIONER ALLAN G. RODGERS (Massachusetts):

17 One suggestion. I don't know why the thoughts
18 contained in that language that the committee wants
19 can't be incorporated into Section 308 on
20 prescriptions, which seems to cover the same territory,
21 either in the text or in the comment perhaps. 308,
22 does it not cover pretty much the same territory --
23 that is, prescriptions and dispensing of controlled
24 substances by medical people in pharmacies.

25 CHAIRMAN LEINENWEBER: Does the committee wish

1 to look at that? The committee will look at that.

2 Further discussion on Section 705?

3 Proceed to 706, which I believe the balance is
4 boilerplate, is that correct? There are some
5 amendments, however, to matters which have previously
6 been read.

7 COMMISSIONER DAVID A. GIBSON (Vermont): Each
8 commissioner should have a document entitled
9 "Amendments to Uniform Controlled Substances Act,
10 1990," dated July 16, 1990, consisting of 11 pages. If
11 you would refer to those at this time, we will take up
12 first Amendment No. 1, which is to Section 308.

13 In reviewing these amendments, the new
14 language from what appears in the blue book is that
15 language which is underlined twice. Look for the
16 double underline. If your eyesight is as bad as mine,
17 it may blur into one line. There are two lines under
18 the new language.

19 The only change to Section 308 appears on Page
20 2, Line 23, subsection (h), a matter which I had
21 highlighted previously, where the word "not" is
22 inserted between the words "may" and "dispense" so that
23 subsection (h) reads: "An individual practitioner may
24 not dispense a substance included in Schedule II, III
25 or IV for that individual practitioner's personal use

1 except in a medical emergency."

2 I would add, I think this question was debated
3 at one of our annual meetings when we were presenting
4 the act, and that this reflects the views of the
5 conference at that time. It was just a typographical
6 mistake that the word "not" was omitted.

7 CHAIRMAN LEINENWEBER: Is there discussion on
8 the first amendment to 308?

9 If not, all those in favor, signify by saying
10 "aye."

11 All those opposed.

12 The motion carries. Proceed to the second
13 amendment.

14 COMMISSIONER GIBSON: Amendment --

15 COMMISSIONER PETER F. LANGROCK (Vermont):
16 Question of procedure. We are now moving to Section
17 402. I have an amendment to offer to Section 401. Do
18 you want to wait until we go through these or take them
19 as --

20 CHAIRMAN LEINENWEBER: The committee prefers
21 to consider its own amendments and then proceed back to
22 the amendments from the floor.

23 COMMISSIONER GIBSON: Amendment No. 2 begins
24 on Page 3 of the handout, relates to Section 402. The
25 amendment there relates to subsection (b), which is

1 found at Lines 19 through 24.

2 COMMISSIONER BRYCE A. BAGGETT (Oklahoma):
3 Could I ask that you identify the pages of the original
4 as well? Some of us have markings on our originals
5 that we would like to refer to as these are discussed.

6 COMMISSIONER GIBSON: I'd be happy to,
7 commissioner. That is on Page 80. The material that
8 has been amended -- if you would turn to Page 80,
9 starting Line 15 through 19 subsection (b), the added
10 language begins at the end of Line 21 with the word "a"
11 and extends into Line 22 with the words "person will
12 possess or distribute." And then we are deleting in
13 Line 23 the words "will be used." And then we are
14 adding in Line 24 the words "to that person" at the end
15 of the subsection.

16 The section will read as follows: "It is
17 unlawful for any manufacturer or distributor, or agent
18 or employee of a manufacturer or distributor, having
19 reasonable cause to believe that a person will possess
20 or distribute a controlled substance in violation of
21 this [Act], to deliver the controlled substance to that
22 person."

23 The committee's reason for the change in this
24 section is to tighten it up a bit so that it's clear
25 that the duty of the manufacturer, distributor or the

1 agent or employee is more explicit than it previously
2 was.

3 CHAIRMAN LEINENWEBER: Discussion on the
4 amendment, Page 80.

5 All those in favor, signify by saying "aye."

6 All those opposed.

7 The amendment carries. Proceed to the third
8 amendment.

9 COMMISSIONER GIBSON: Amendment 3 relates to
10 Section 405, which is found at Page 85 of the blue
11 book. We have simply added one word in the blue book.
12 It's on Line 15. It appears on Line 1 of Page 6. The
13 word that is added is the word "that," which is
14 inserted before the word "person." The word "a"
15 previously appearing there has been deleted.

16 Subsection (b) therefore reads: "It is
17 unlawful for any person knowingly or intentionally to
18 deliver or possess with intent to deliver, a
19 noncontrolled substance intended by that person for use
20 or distribution as a controlled substance or under
21 circumstances in which that person reasonably should
22 know that the noncontrolled substance will be used or
23 distributed for use as a controlled substance."

24 CHAIRMAN LEINENWEBER: Discussion on Amendment
25 No. 3. If not, the --

1 COMMISSIONER MAYNARD E. PIRSIG (Minnesota): I
2 am not sure whether this is the right point at which to
3 raise a more general question concerning the terms
4 "knowingly or intentionally." It appears here, but it
5 appears generally in the act other than this. And if
6 it's not appropriate to raise it at this point, I would
7 like to raise it at some point later.

8 COMMISSIONER GIBSON: Commissioner, that
9 phrase is used throughout the penalty provisions. It
10 perhaps is a more general -- for more general
11 discussion, we will be having opportunity to raise
12 those types of questions at a later time.

13 CHAIRMAN LEINENWEBER: The motion is to amend
14 Section 405, Page 85, Line 15 by striking the word "a"
15 and inserting the word "that."

16 All those in favor, signify by saying "aye."
17 Opposed.

18 The motion carries.

19 COMMISSIONER GIBSON: Amendment 4 appears on
20 Page 6 of the handout. It relates to Section 411,
21 which appears at Pages 92 and 93 of the blue book. The
22 only language amended here relates to subsection (2) of
23 subsection (a), which is Lines 3 and 4 on Page 93 of
24 the blue book, and which appears here at Lines 24 and
25 25 of the amendment. The words added are the words "on

1 separate occasions" at the tail end of subsection (2).

2 The section would read as follows: "(a) A
3 person who engages in a continuing criminal enterprise
4 is guilty of a crime and upon conviction is punishable
5 by a term of imprisonment and fine not exceeding [two
6 times] that authorized by Section 401 for the
7 underlying offense. For purposes of this subsection, a
8 person is engaged in a continuing criminal enterprise
9 if:

10 "(1) the person violates any provision of this
11 [Act] which is a felony; and

12 "(2) the violation is a part of a continuing
13 series of two or more violations of this [Act] on
14 separate occasions."

15 Then it goes on with the balance of the
16 provisions.

17 CHAIRMAN LEINENWEBER: Is there discussion on
18 this amendment?

19 Amendment No. 4, to amend Section 411,
20 subparagraph (a)(2) by adding at the conclusion, which
21 is located on Line 4, the words "on separate
22 occasions."

23 All those in favor, signify by saying "aye."
24 Opposed.

25 The motion carries. The amendment is adopted.

1 Proceed to Amendment 5.

2 COMMISSIONER GIBSON: Amendment 5 appears at
3 Pages 8 and 9 of the handout. It relates to Section
4 412, which begins on Page 94 and extends over to Page
5 95 of the blue book. The amendment in this section is
6 to delete certain words found in subsection (b) as
7 shown at Line 20 of the handout. The words being
8 deleted "maintain an interest in or." In the blue
9 book, it appears on Line 3, Page 95.

10 (b) will read as follows: "It is unlawful for
11 any person knowingly or intentionally to give, sell,
12 transfer, trade, invest, conceal, transport, or
13 otherwise make available anything of value which that
14 person knows is intended to be used for the purpose of
15 committing or furthering the commission of any
16 violation of this [Act]."

17 CHAIRMAN LEINENWEBER: Is there discussion on
18 Amendment No. 5?

19 The question is whether or not to strike the
20 words "or maintain an interest in" which is located on
21 Line 3 of Page 95 of subparagraph (b) of Section 412.

22 All those in favor, signify by saying "aye."

23 All those opposed.

24 The motion is adopted.

25 COMMISSIONER BRYCE A. BAGGETT (Oklahoma):

1 Before we leave that section --

2 CHAIRMAN LEINENWEBER: Commissioner Baggett.

3 COMMISSIONER BAGGETT: Before we leave that
4 section, would the committee explain what verb
5 "knowingly and intentionally" modifies?

6 COMMISSIONER GIBSON: I don't believe it
7 modifies any verb. It speaks to the state of mind the
8 person must have to have committed a crime.

9 COMMISSIONER BAGGETT: Isn't "knowingly and
10 intentionally" an adverbial modification of "give,
11 sell, transfer, trade, invest, conceal, transport or
12 maintain"?

13 COMMISSIONER GIBSON: It would modify those
14 words, that is correct.

15 COMMISSIONER BAGGETT: Isn't the knowing and
16 intent that we really mean to cover that they know and
17 intend it to be used for the purpose of committing or
18 furthering the commission of a violation? It looks
19 like, to me, you put an adverb in place where it
20 modifies -- it's a descriptive modification of the
21 action verb rather than the commission of a violation
22 of the act, which is what you intend.

23 COMMISSIONER GIBSON: The language in that
24 section indicates that the person must know that it is
25 intended to be used for the purpose of violating the

1 act. If you would feel more comfortable by inserting
2 those words "knowingly or intentionally" in that part
3 of it, we would be glad to consider it.

4 CHAIRMAN LEINENWEBER: Commissioner McCracken.

5 COMMISSIONER THOMAS J. MCCRACKEN, JR.

6 (Illinois): The word "knowingly" is used the first
7 time in that paragraph as an intent, a mens rea
8 requirement. The second "knowingly" relates to
9 personal knowledge of the intended use of the property.
10 It's used in two different ways in that paragraph. For
11 that reason, I think it's properly set forth.

12 COMMISSIONER GIBSON: Amendment 6 relates to
13 Section 605. This is found at Pages 9 and 10 of the
14 handout. Section 605, itself, appears in the blue
15 book, as I hurriedly thumb through my pages here, on
16 Page 158.

17 The changes, and this is where it gets a
18 little confusing, you will see in Line 21 after the
19 "(a)" the word "it" has a strike-through through it,
20 but it also has a double underline through it. The
21 strike-through means it was deleted. The double
22 underline means it is being restored. In any event,
23 the words being deleted from Line 21 are the words
24 "except as provided in Section 505 (c)," since we no
25 longer have that section to refer to.

1 And then on Page 10, there have been changes
2 made in Lines 13 through 15 based on the discussion on
3 Saturday to rework the wording of that section along
4 the lines discussed therein.

5 Subsection (a), starting at Line 21, Page 9,
6 reads: "It is not necessary for the state to negate
7 any exemption," et cetera. I won't bother to reread
8 all of this section.

9 Subsection (c) will read: "No civil or
10 criminal liability is imposed by this [Act] upon any
11 authorized state, county, or municipal officer engaged
12 in the performance of lawful duties under this [Act]."

13 CHAIRMAN LEINENWEBER: You heard the
14 amendment. Is there discussion?

15 COMMISSIONER FRED H. MILLER (Oklahoma): This
16 section originally dealt with the burden of proof. I
17 agree with you, that if you looked at the context with
18 the Chinese, you would be able to see what you have
19 done. But when you look at the clean ccpy, the tail
20 end of (a) is going to read "the burden of producing
21 evidence." In other words, it doesn't relate to the
22 burden of proof. In conjunction with the balance of
23 (a), I am afraid that a person is going to read that to
24 perhaps indicate that the ultimate burden of proof is
25 on the person claiming the exception or the exemption,

1 which I don't believe is consistent with the amendment
2 from the floor.

3 I would ask the committee to respond as to why
4 you don't make just an affirmative statement at the
5 tail end of (a) that the burden of proof of any
6 exemption or exception is upon the state.

7 COMMISSIONER GIBSON: Commissioner, I'm not
8 sure what other floor action you have in mind that
9 we --

10 COMMISSIONER MILLER: I made a motion on
11 Saturday which I thought passed.

12 COMMISSIONER GIBSON: It did, but that section
13 is gone now.

14 COMMISSIONER MILLER: Well, Professor Hogan
15 pointed out, which I didn't think was needed, but now I
16 am convinced he was right, as he often is, that we
17 would have to --

18 COMMISSIONER WILLIAM E. HOGAN (New York):
19 That's a first. I want you all to know that is a
20 first.

21 [Laughter]

22 COMMISSIONER MILLER: -- we would have to call
23 the attention of the committee to the fact that because
24 Section 505 was amended or gone, that something would
25 have to be done here, and he did that. And I am only

1 calling the attention of the committee to the fact that
2 I don't think, under the circumstances, you have made
3 it very clear what that motion was intended to produce.
4 I am asking the committee why you wouldn't have a clear
5 statement of the burden of proof. This is what the
6 section dealt with before; it was a question of
7 reallocating that.

8 COMMISSIONER GIBSON: Commissioner, the simple
9 answer is, with the deletion of Article V, we now get
10 back only to provisions such as are found in Article
11 III where we relate a person having a license or
12 registration to manufacture and distribute. In
13 connection with any prosecutions for those violations,
14 it is our understanding that the burden of proof in a
15 criminal case, a key element is that it remains with
16 the prosecuting authority throughout. Therefore, we do
17 not believe that this section appropriately relates to
18 burden of proof, but rather the burden of producing
19 evidence, and the title to this section has been
20 changed to reflect that.

21 COMMISSIONER FRED H. MILLER (Oklahoma): Might
22 I press the point a little bit further, if I understand
23 your answer, Dave. Are you saying really that there
24 are no longer any exemptions or exceptions and so maybe
25 this whole sentence should come out?

1 COMMISSIONER GIBSON: No, that is not what I
2 am saying. I think there are some found --
3 particularly in Article III, and perhaps in Article II
4 as well.

5 COMMISSIONER MILLER: I will accept that.
6 Thank you.

7 CHAIRMAN LEINENWEBER: Commissioner Hogan.

8 COMMISSIONER WILLIAM E. HOGAN (New York): I
9 rise on the same point. Are any of these exemptions or
10 exceptions related to a civil responsibility on
11 anyone's part?

12 COMMISSIONER GIBSON: At this point, I am not
13 aware that they would be. But I won't rule it out as a
14 possibility. There might be something in the
15 administrative provisions in Article II that relate to
16 them. I'd have to take a closer look at it to do so.
17 If you like, we can do that and come back to it at a
18 later time.

19 COMMISSIONER HOGAN: I would appreciate that.

20 COMMISSIONER PATRICK C. GUILLOT (Texas): I do
21 believe there is a burden on the manufacturer, for
22 example, and on the pharmacist to have a license. So,
23 to that extent, yes, if you wish to produce controlled
24 substances as a manufacturer, you must be licensed
25 under most -- as far as I know, in all states. If you

1 wish to dispense them as a pharmacist, you must be a
2 licensed pharmacist in the state. If you are arrested
3 for some reason for possessing a controlled substance,
4 your exemption is that you're a pharmacist and you
5 produce the evidence of your license, and that is it.

6 COMMISSIONER HOGAN: Your exemption from what?

7 COMMISSIONER GUILLOT: I'm not sure if I'm
8 using the right word --

9 COMMISSIONER HOGAN: You're exempted -- all
10 I'm trying to find out is what you are exempted from
11 under this section. What exemptions are we talking
12 about? Are we talking about an exemption from criminal
13 responsibility or some kind of civil responsibility?

14 COMMISSIONER GUILLOT: You could have
15 administrative license revocation, the dispensing of
16 it. You're exempt from being prosecuted for the
17 dispensing of it.

18 COMMISSIONER HOGAN: I have no trouble with
19 that one. But if there are other possible causes of
20 action on a civil level, I would have trouble.

21 COMMISSIONER GUILLOT: The only civil you
22 would have, obviously, would be the revocation of a
23 license for abuse, but that is not what you are talking
24 about, as I take it.

25 COMMISSIONER HOGAN: Maybe I can get to my

1 point by moving to strike the word "exemption." Are
2 there any other exemptions in the act? There are
3 exceptions that I am aware of.

4 CHAIRMAN LEINENWEBER: To keep this straight,
5 you're moving to amend the motion?

6 COMMISSIONER HOGAN: I'm really asking a
7 question. I'm not seriously moving yet.

8 COMMISSIONER GIBSON: Commissioner Hogan, if
9 you would be so kind as to hold that until later. You
10 will have an opportunity.

11 COMMISSIONER HOGAN: I will be happy to.

12 CHAIRMAN LEINENWEBER: Commissioner Baggett on
13 the motion.

14 COMMISSIONER BRYCE A. BAGGETT (Oklahoma): For
15 a question. As the amendment was read, did the last
16 few words come out reading "officer engaged in the
17 performance of lawful duties under this [Act]"?

18 COMMISSIONER GIBSON: That is correct.

19 COMMISSIONER BAGGETT: All right. Since
20 lawful duties is a redundancy, you couldn't have an
21 unlawful duty for an officer. Don't you intend your
22 modifying word "lawful" to modify the word
23 "performance" rather than "duty," so that it should
24 read "officer engaged in the lawful performance of
25 duties under this [Act]." Isn't that what you intend?

1 COMMISSIONER GIBSON: That's the way we had it
2 before. And based on floor discussion on Saturday, we
3 have changed it.

4 COMMISSIONER BAGGETT: You now intend to refer
5 to lawful duties. Could you give me an example of an
6 unlawful duty of an officer. I am having trouble with
7 the concept of an officer having an unlawful duty.

8 COMMISSIONER GIBSON: I share your concern,
9 commissioner. I do not have a ready example for you,

10 COMMISSIONER BAGGETT: If we can't draft
11 better than that, this thing isn't ready to go out in
12 this portion this year.

13 CHAIRMAN LEINENWEBER: Further discussion on
14 the motion.

15 COMMISSIONER EUGENE A. BURDICK (North Dakota):
16 Would you mind restating the motion, please.

17 COMMISSIONER GIBSON: Do you want the
18 subsection (c) read again?

19 COMMISSIONER BURDICK: No, I don't desire
20 that. What is the motion?

21 COMMISSIONER GIBSON: As far as I know, the
22 only motion that would be appropriate is to approve the
23 amendment as presented.

24 COMMISSIONER BURDICK: With Commissioner
25 Baggett's suggestions?

1 CHAIRMAN LEINENWEBER: Commissioner, that was
2 not a motion. That was, I presume, a suggestion as to
3 drafting.

4 COMMISSIONER BURDICK: Certainly the language
5 as presently used is improper. The Committee on Style
6 can correct it, as far as that goes.

7 CHAIRMAN LEINENWEBER: Presumably that will
8 take place. They will take care of it.

9 COMMISSIONER BURDICK: All right.

10 COMMISSIONER ROBERT J. TENNESSEN (Minnesota):
11 I raised that question on the floor. I think you just
12 go back to the original language of the act, not with
13 your attempted amendment.

14 CHAIRMAN LEINENWEBER: All right. All those
15 in favor of the motion, which is to amend Section 605,
16 signify by saying "aye."

17 All those opposed.

18 The "ayes" have it. The motion carries. Move
19 on to the next amendment.

20 COMMISSIONER GIBSON: The committee has in
21 mind the comments concerning subsection (c). We will
22 try to straighten it out.

23 The last amendment to be presented, Amendment
24 7, Pages 10 and 11. This is really an alternative to
25 the action of the floor on Saturday. I apologize for

1 the presentation of it as an amendment, but we would
2 like to present it for consideration.

3 Section 703 appears on Page 165 of the blue
4 book. As it was amended, it would require the
5 conviction of a violation of Section 411 before any
6 judgment for damages could be established. During the
7 course of the discussion on the floor, there was some
8 suggestion that if it were more narrowly drawn, that
9 there might be an appropriate way to try to reach
10 civilly persons who may in fact have violated the act
11 but have not been convicted of it for reasons such as
12 absence from the territory, death or some other
13 disability from being sued.

14 With that in mind, as an alternative to
15 Section 703 as it was amended on the floor, we have
16 presented the material at Pages 10 and 11 styled as
17 Amendment No. 7. Please bear in mind, this is an
18 alternative only to the action of the floor taken on
19 Saturday. It would read as follows:

20 "SECTION 703. CONTINUING CRIMINAL ENTERPRISE;
21 CIVIL ACTION.

22 "(a) The [appropriate authority] may maintain
23 a civil action against any person or persons who
24 violate Section 411 to obtain a judgment for joint and
25 several damages in an amount equal to three times the

1 proceeds acquired by that person or those persons by
2 reason of their violation of Section 411, together with
3 costs incurred for resources and personnel used in the
4 investigation and prosecution of the proceedings
5 through which their liability was established.

6 "(b) The standard of proof in actions brought
7 under this section is a preponderance of the evidence.

8 "(c) As used in this section, 'proceeds'
9 means property acquired or derived directly or
10 indirectly from, maintained by, produced through, or
11 realized through, conduct without reduction for
12 expenses incurred for any purpose.

13 "(d) This section must be liberally construed
14 to effectuate its remedial purposes."

15 CHAIRMAN LEINENWEBER: Commissioner Langrock.

16 COMMISSIONER PETER F. LANGROCK (Vermont): If
17 I understand correctly, this is an attempt to
18 completely reverse the action taken upon the floor,
19 which would require a conviction. I hadn't read it
20 that way at first.

21 COMMISSIONER DAVID A. GIBSON (Vermont): It
22 should have been presented as an alternative to the
23 action taken on the floor on Saturday. You may call it
24 a complete reversal, but it is also much more limited
25 than the original Section 703 was drafted in terms of

1 its effect. It was presented as an alternative to
2 follow up on a suggestion from Commissioner Perlman
3 that we might consider more narrowly drafting the
4 original Section 703 to get at the problem that was
5 tried to be addressed by it. But if you wish to call
6 it a reversal, I'm not going to quibble with you on the
7 wording.

8 COMMISSIONER LANGROCK: I respect Commissioner
9 Perlman's position, but he doesn't speak for the house,
10 which I think took a very strong position. I don't
11 know what the parliamentary situation is. Is this
12 basically a motion to reconsider? Doesn't that have to
13 be put forward by somebody who voted on the prevailing
14 side?

15 COMMISSIONER GIBSON: Commissioner, it's
16 presented as an alternative. If the conference wishes
17 to reject it, we will present the written version as
18 amended by the conference. As I indicated, it had been
19 my intention to do so in connection with this, but it
20 unfortunately didn't get styled that way. This would
21 be viewed as a motion by the committee to substitute
22 for the floor action. If the conference wishes to
23 reject it, that is fine.

24 COMMISSIONER LANGROCK: I would like to speak
25 to the motion. I think that we discussed this quite

1 fully yesterday.

2 I see a New York Times article with one of the
3 prosecutors quoting that the basic action by this group
4 that we are going to take this week is to strengthen
5 laws which allow for the seizure of property. The
6 forfeiture acts, we couldn't write those, apparently,
7 so they're out. Now we have not a forfeiture but a
8 civil liability situation. And what we are saying
9 here, that if you believe -- I think we talk here
10 about -- I don't know whether we are in billions or
11 not, now, but we are talking about substantial sums
12 which are being used for punishment purposes. They go
13 beyond the monies by the particular individual. They
14 can be sought without seeking criminal conviction.

15 I spend maybe 20 percent of my time doing
16 criminal defense work. I don't know how many of you
17 people realize the impact on an individual being
18 accused of a crime.

19 What we have here is, in effect, allowing the
20 state to come forward and say: You are a racketeer,
21 you are a gangster, and we are going to take your money
22 to teach you a lesson. And the standard of proof to do
23 that is 50 percent.

24 I think there is a constitutional challenge to
25 that. I am not sure the present court would accede to

1 my constitutional challenge. But I think there is a
2 basic proposition of fairness. And I thought we had
3 established that the other day by a strong vote of the
4 house, that we are not going to call something a civil
5 action when it really is a criminal penalty and simply
6 reduce the burden of proof.

7 What we have here is an attempt by the
8 prosecutorial interest to come up with a way of proving
9 somebody guilty of a crime without being able to have
10 the requisite proof. In this day of tremendous
11 pressures, tremendous hysteria, the balancing test, the
12 50, 51 percent is not a fair way to label somebody a
13 gangster, a racketeer, a drug dealer, of consequence, a
14 person involved in continued criminal enterprise.

15 I urge you not to reverse the position of the
16 floor on Saturday.

17 CHAIRMAN LEINWENBER: Commissioner Baggett.

18 COMMISSIONER BRYCE A. BAGGETT (Oklahoma):

19 Point of order. If the conference and the Committee of
20 the Whole voted on this as a matter of principle on
21 Saturday, and no motion to reconsider was lodged or it
22 is not now lodged by someone voting on the prevailing
23 side, the proposal of an amendment which goes to the
24 heart of the matter decided Saturday is, in effect, out
25 of order.

1 CHAIRMAN LEINENWEBER: It's my understanding,
2 where there is no written roll call, that a motion may
3 be posed to reconsider, but whether a motion to
4 reconsider is in order -- Commissioner Lebrun, is it
5 necessary to reconsider or is this motion in order as
6 posed by the committee?

7 COMMISSIONER GENE N. LEBRUN (South Dakota):
8 Since we are in a different session than we were
9 Saturday, the motion is appropriate without a motion to
10 reconsider.

11 CHAIRMAN LEINENWEBER: The point of order is
12 rejected.

13 On the motion.

14 COMMISSIONER PATRICK C. GUILLOT (Texas): The
15 civil penalties as set forth in Section 703 are similar
16 to the state RICO statutes that have been upheld,
17 similar to the federal RICO statute. The continuing
18 criminal enterprise deals with someone who is in charge
19 of at least five people below him, so you're dealing
20 with what has been oftentimes called a kingpin or a
21 boss man. You are not dealing with a runner of some
22 marijuana, ounces from one place to the other, and
23 you're not dealing with lower-echelon people. You are
24 dealing with the top dogs in the crime world today.
25 You're dealing with people who have made millions of

1 dollars and who are making millions of dollars daily on
2 the illegal sale and distribution of drugs.

3 In order to make the statute have some teeth
4 in it and to give some additional teeth to existing
5 statutes that already are on the books, if we allow the
6 state to go after these people's money after they have
7 either left the country or they have died or they have
8 killed all the witnesses necessary to prove their guilt
9 in a criminal action, you still take away from them and
10 hit them where they hurt the most, and that is in the
11 pocketbook.

12 This provision of the act has withstood
13 constitutional attacks in the RICO area and in the area
14 of the federal act. There is no problem with it being
15 constitutionally sound.

16 The question is, are we going to try to take
17 from the drug kingpins the money that they have made.
18 And the answer is, I think we should. Consequently, we
19 should allow the state, if they cannot get a criminal
20 prosecution, for reasons that the person has fled and
21 is now in Brazil, he is dead, or for whatever reason,
22 they can still at least prove by a preponderance of the
23 evidence that he has participated in a continuing
24 criminal enterprise and get treble damages.

25 I think that we ought to pass it. I think we

1 ought to put some teeth into this section and hit these
2 guys where it hurts, and that is in the pocketbook.

3 CHAIRMAN LEINENWEBER: Commissioner on my far
4 right.

5 COMMISSIONER ROBERT J. TENNESSEN (Minnesota):
6 The trouble I have with this amendment goes to the
7 committee's suggestion that they're trying to tighten
8 it up and then come back with paragraph sub (d).

9 I submit that that is what is troubling us
10 about the work of the committee. It certainly was
11 troubling me about the work of the committee. On the
12 one hand, as in the previous amendment, the question
13 was put the other day as to whether or not there was
14 any intended change, and the answer was no. Today we
15 come back with some new language that suggested
16 probably it is an intended change.

17 This one seemes to say that, well, we are
18 tightening it, but we are really not. I don't know
19 why, when you're looking at the government going after
20 individuals, we have to say that this law will be
21 liberally construed on behalf of the government. Would
22 you suggest that the government always have that policy
23 or right or presumption, interpretation, whatever? It
24 seems to me that this amendment isn't what the
25 committee says it is.

1 CHAIRMAN LEINENWEBER: Commissioner on my far
2 left.

3 COMMISSIONER PAULA TACKETT (New Mexico): I'm
4 not actually speaking to Commissioner Langrock's
5 question. But on Page 11, has something been left out?
6 "As used in this section, 'proceeds' means" in
7 subsection (c). It doesn't seem to read -- I wonder if
8 the committee could see if something had been left out.

9 Also, the question about "maintained by." If
10 this doesn't get us back to the innocent spouse
11 situation where five or more guys -- to me, five or
12 more people does not necessarily make a big kingpin.
13 What you're talking about in Section 411 is any
14 violation of this act. I am wondering about
15 "maintained by," if that is not too broad.

16 CHAIRMAN DAVID A. GIBSON (Vermont:
17 Commissioner, I think perhaps you are correct relating
18 to the definition of proceeds, that that is meant to
19 cover the actions involved in the violation of Section
20 411. We will so change that particular provision.

21 CHAIRMAN LEINENWEBER: Commissioner.

22 COMMISSIONER HARVEY S. PERLMAN (Nebraska): I
23 am the one who invited you to do this. I suppose I
24 bear some responsibility for it.

25 It is not an easy question, I think. I am not

1 fully comfortable that I yet understand the amendment
2 or that it's narrow enough for me to support it.

3 But on balance, there are, I think, a number
4 of examples in which we have civil penalties in the law
5 that are reflective and analogous to criminal conduct.
6 We have it in the antitrust laws. The Federal Trade
7 Commission can go after deceivers with civil penalties.
8 We have largely gotten over, I think, the question of
9 whether you can do things like this, properly tailored,
10 with a lower burden of proof than reasonable doubt.

11 Again, I think this draft still has this urge
12 to overstate when a simple, straightforward provision
13 would be adequate and supportable.

14 I would move an amendment, subsection (a),
15 essentially the thrust of it is to change it to
16 singular, since I don't know what all this plural
17 means, and we don't normally draft it this way anyway.
18 It would be: "The appropriate authority may maintain a
19 civil action against any person who violates Section
20 411 to obtain a judgment in an amount equal to three
21 times the proceeds acquired by that person." There
22 would be some other language necessary to fill that
23 out.

24 I would eliminate subsection (d) as
25 unnecessary.

1 Let me stop with that. That limits the
2 section to going after an individual civilly for the
3 proceeds that they have derived from engaging in the
4 conduct in 411, which is criminal enterprise with five
5 or more persons in a significant way. It seems to me
6 that is a tool that we ought to provide.

7 CHAIRMAN LEINENWEBER: There is a motion now
8 on the floor to amend the committee's Amendment No. 7
9 in subparagraph (a) by making -- the committee will
10 accept it. We are back to the motion -- Commissioner
11 Langbein on the main motion.

12 COMMISSIONER PETER F. LANGROCK (Vermont): Can
13 I have the language that was accepted?

14 CHAIRMAN LEINENWEBER: As I understand, to
15 make paragraph (a) singular and strike (b), is that
16 correct?

17 COMMISSIONER HARVEY S. PERLMAN (Nebraska):
18 Strike (d).

19 CHAIRMAN LEINENWEBER: (d) as in dog.

20 COMMISSIONER LANGROCK: How does Paragraph (a)
21 read now?

22 CHAIRMAN LEINENWEBER: They haven't drafted it
23 yet. He suggested it be in the singular, be limited --

24 COMMISSIONER LANGROCK: So I understand it,
25 they have accepted the concept that the amount only

1 comes from what that person derives.

2 CHAIRMAN LEINENWEBER: Right.

3 COMMISSIONER RICHARD L. BRAUN (North
4 Carolina): Point of information. When you made that
5 motion, were you referring to subsection (b) as in
6 "boy" or (d) as in "dog"?

7 COMMISSIONER PERLMAN: (d) as in dog.

8 CHAIRMAN LEINENWEBER: My mistake.

9 Commissioner Langbein on the main motion.

10 COMMISSIONER JOHN H. LANGBEIN (Illinois): I
11 have tried to be as tolerant as I could this morning of
12 the many improvements in this act that have gone
13 forward. I find myself in opposition to this
14 amendment.

15 I think that when Commissioner Guillot tells
16 us that this is to be justified because it's like RICO,
17 he is making my case about as well as I could ask. I
18 think RICO is a dreadful development. I speak from the
19 conservative side of the political spectrum. I think
20 that anybody who has been following the Wall Street
21 Journal over the last two years and has read the steady
22 barrage of remarkable disclosures about abuse of civil
23 RICO understands that there is a tremendous amount to
24 be legitimately concerned about in this kind of
25 statute.

1 What is at stake here is a fundamental
2 confusion of civil and criminal procedure and the
3 standards appropriate to it. When Commissioner Guillot
4 tells us that this is useful to go get a kingpin, that
5 begs the question of why he can't prove that somebody
6 is a kingpin in the criminal process and use the
7 existing control sanctions to do the job. We're told
8 this is for somebody who is dead or in Brazil. Well,
9 it's not limited to somebody who is dead or in Brazil.
10 This is drafted so that we can get a drastically lower
11 standard of proof, the civil standard of proof brought
12 to bear on people who prosecutors don't like.

13 When I was speaking about this act in Hawaii,
14 I was saying, and I will say it again this year, that
15 the most troublesome thing about the 400 sections in
16 this act, to me, is the total trend toward
17 prosecutorial discretion. I wanted to relabel this
18 act, instead of the Uniform Controlled Substance Act, I
19 want to relabel it the Uniform Uncontrolled
20 Prosecutorial Discretion Act. It seems to me that the
21 total drift of these provisions is basically to
22 eliminate criminal adjudication in various ways. I am
23 going to hope I have the opportunity later this morning
24 to talk about the mandatory minimums, which basically,
25 although they look as though they're tough sentencing

1 measures, in fact all they do is make it impossible for
2 people to have trials, move the discretion over to the
3 prosecutors and transfer something into the plea
4 bargaining process as opposed to the careful
5 ventilation that occurs in the criminal trial.

6 This kind of measure that we are looking at
7 here is another one of the standard things that has
8 popped up in the bag of tricks the prosecutors brought
9 to bear against all sorts of perfectly respectable
10 people, as well as drug dealers. What this says is:
11 Trust us. Trust us, trust us, trust us. Give us a
12 tremendous discretion to proceed against people that we
13 don't like that we are going to call kingpins, even
14 though we haven't proved it, by civil standards of
15 proof.

16 Just the very act of being labeled that in a
17 civil suit is enough to destroy the reputation of any
18 one of us. You bring that action against me and I am
19 dead in the water. I am destroyed in my community.

20 This is civil procedure being used for what is
21 effectively the purposes of the criminal law. It's for
22 that reason that I oppose it, as I would have opposed
23 RICO if I had been in Congress at the time and known
24 what it was all about -- not that anybody did.

25 Thank you,

1 CHAIRMAN LEINENWEBER: The commissioner on my
2 right.

3 COMMISSIONER ELLEN F. DYKE (District of
4 Columbia): When we start getting in a discussion of
5 RICO, I think we start mixing apples and oranges, as
6 there are many problems with the RICO law, and possibly
7 the worst of which is that it's being used in a context
8 in which it was not intended to be used. It is not
9 necessarily that there is a civil penalty available,
10 but that RICO itself has its own problems with its use.

11 I think that the law does have civil penalties
12 of this sort and treble damages for them. And I think
13 that in this context we may really look at it to see
14 that it may be deserved here.

15 One of the problems I have with Section (c) is
16 the term "proceeds" itself. I am not quite sure how we
17 define it. If we are defining it as property, then are
18 we talking about valuing property that may have
19 gotten -- and how one does that? Apparently, you meant
20 it to be broader than just cash and amounts received,
21 money received. Is that something that needs to be
22 included in (c) to understand what we are doing in
23 terms of proceeds, three times of which is what you're
24 calling for in terms of a remedy?

25 CHAIRMAN LEINENWEBER: The commissioner on my

1 far left.

2 COMMISSIONER ALVIN J. MEIKLEJOHN, JR.

3 (Colorado): I hope that we adopt this substitute.
4 Exaggerated illustrations should not be permitted to
5 obscure the central fact that you have got to get this
6 money off the streets. These people are swimming in
7 it. And give the enforcement officials the opportunity
8 to clean up drug traffic. At least in my state,
9 they've got to have this power.

10 This isn't a first, despite the inferences
11 that it might be. You know, look at where there are
12 environmental crimes against society. This is
13 murdering the people of the United States. We need
14 strong enforcement. We need the ability to hit these
15 people who are supervising five people a little harder
16 than perhaps the guy that's just out there driving the
17 car and making the deliveries. But I have no sympathy
18 for them. Somehow we have to stop it. This a long
19 step forward, and I hope we adopt it.

20 CHAIRMAN LEINENWEBER: Commissioner.

21 COMMISSIONER ALLAN G. RODGERS (Massachusetts):
22 On Line 11, Page 11, I was unclear how the committee
23 reacted to Commissioner Tackett's suggestion that the
24 words "maintained by" perhaps were not appropriate in
25 that context. Did the committee accept that suggestion

1 or not?

2 COMMISSIONER DAVID A. GIBSON (Vermont):

3 Commissioner, I hesitate to speak on behalf of the
4 entire committee. What we are seeking to reach are
5 assets that may be acquired by violations of Section
6 411 and be able to trace them as they may be converted
7 into other assets. Maintenance of an asset can take
8 different forms. Whether those words are necessary
9 here, I am not sure.

10 COMMISSIONER ALLAN G. RODGERS (Massachusetts):

11 I would like to suggest that maybe I make a motion that
12 the words "maintained by, produced through, or realized
13 through" are really duplicative of the words "derived
14 directly or indirectly." I wonder why you need that
15 extra language. It seems to me the words "derived
16 directly or indirectly" will cover all those situations
17 that you want to cover.

18 COMMISSIONER GIBSON: Commissioner, I would
19 suggest if this alternative provision survives this
20 motion to eliminate it -- I guess it's the other way.
21 If the motion is not carried to substitute this
22 provision, the committee will be glad to take a look at
23 it and see perhaps about the suggestion you make.

24 CHAIRMAN LEINENWEBER: Commissioner McCracken.

25 COMMISSIONER THOMAS J. MCCRACKEN, JR.

1 (Illinois): Thank you. I have concerns about deleting
2 the reference to the plural in Section 703. The
3 essence of a violation is conspiracy. You want joint
4 and several judgments. Therefore, I think you need the
5 plural to be retained. Deleting all that and leaving
6 it to a singular form, make a note to a court a desire
7 not to apply joint and several liability, or at least
8 joint liability.

9 Also, this may sound a little extreme, but
10 there has been found to be a private cause of action in
11 federal RICO civil actions. I don't think that was
12 necessarily the intent of Congress. Do you think it
13 would be prudent to address that issue in this section?

14 CHAIRMAN LEINENWEBER: Commissioner Baggett.

15 COMMISSIONER BRYCE A. BAGGETT (Oklahoma): I
16 oppose the proposed amendment for these reasons. A
17 rose by any other name would smell as sweet. We have
18 decided that we don't have time for ordinary
19 forfeiture. But here we have time for treble damages,
20 which is treble forfeiture. The objective of this
21 section, just like the objective of the forfeiture
22 section, is to avoid the due process and Bill of Rights
23 requirements for punishing criminal conduct.

24 As one of the commissioners pointed out
25 earlier, this is punitive in nature. This is not a

1 civil lawsuit. This is punishment for criminal
2 conduct. Now, it's labeled as Section 705, but it
3 truly needs to be in Article V. If we are to be
4 consistent -- I realize consistency is the hobgoblin of
5 small minds. But if we don't have time to write the
6 forfeiture provisions, we don't have time to do this
7 little job justice either.

8 You know, fellows, it's awful fun when you
9 think about doing this to those bad, bad drug people.
10 But do you remember the howls that went up when they
11 started doing this to bankers, doing this to investment
12 bankers? This thing is going to snap shut on you like
13 a bear trap. You think you're only doing it to bad
14 people. You're going to do this to some of your
15 neighbors and some of your clients.

16 CHAIRMAN LEINENWEBER: Commissioner Read.

17 COMMISSIONER HAROLD E. READ, JR.

18 (Connecticut): I oppose the substitution of something
19 contrary to what we voted yesterday.

20 However, I am not sure I understand what the
21 committee accepted. Is it true that Paragraph (a) now
22 reads, "the appropriate authority may maintain a civil
23 action against any person who violates Section 411 to
24 obtain a judgment for damages in an amount equal to
25 three times the proceeds acquired by that person" --

1 COMMISSIONER GIBSON: That is correct.

2 COMMISSIONER READ: Thank you.

3 CHAIRMAN LEINENWEBER: Commissioner.

4 COMMISSIONER REID C. PIXLER (Colorado): I
5 really strongly endorse Amendment No. 7 and ask you to
6 vote in favor of it.

7 It is true, it's a civil action. It arises in
8 a situation when facts exist that prohibit any other
9 kind of action. What this is seeking to address is the
10 occasion when you find assets in this country that are
11 not traceable because of a break in the chain of the
12 evidence, that belong to someone who is involved in
13 drug trafficking. There are any number of ways that
14 that break in evidence can occur. It can go to a
15 foreign country, Mexico or the Cayman Islands,
16 someplace where the money changes its character. It
17 goes through different accounts and we can no longer
18 trace it because of the unwillingness or the
19 intentional interference with that banking action.

20 That money then is brought back into the
21 country and invested in productive assets that cannot
22 be traced to any kind of proceed. They may belong to
23 Pablo Escobar or anybody else. They may be held in a
24 curious thing called bearer stock certificates where a
25 corporation in a foreign country is owned and

1 controlled by whoever carries the stock, and there is
2 no registered agency. You can't determine who those
3 people are. It's a function of sophisticated,
4 intentional, carefully drafted money-laundering that is
5 intended to disguise and conceal the ownership of the
6 property.

7 We're able to identify these properties --
8 there is one in Arizona going on right now -- identify
9 the property when you know that that property is drug
10 proceeds but have no way of proving it. We do know how
11 much that organization produced because in the course
12 of law enforcement efforts, the captured financial
13 records demonstrate millions of dollars over an
14 eight-month period of time that float south into
15 Mexico. But beyond that, that trail is gone.

16 In this situation, absent capturing the
17 individual who was responsible for this organization's
18 operation and the flow of millions of dollars out of
19 this country and then bringing that money back into the
20 country, we would have no ability to seize and forfeit
21 that property.

22 Now, what this does is an ability to bring
23 civil action, give the opportunity to the individual
24 who controls the property to litigate a continuing
25 criminal enterprise. Beyond that ability, we are not

1 going to be able to produce -- particularly if the
2 individual is dead or he is simply unwilling to come
3 back, we are not going to be able to go forward if
4 you're requiring conviction first. It just simply
5 can't happen. And any assets remain in our country
6 free for the use of the people who have earned it
7 through the operation of the criminal enterprise.

8 It's a very important distinction from the
9 other elements of this act. I think it's critical to a
10 comprehensive approach to the drug intervention and
11 procedures that are a component of this act.

12 CHAIRMAN LEINENWEBER: Commissioner Hamilton.

13 COMMISSIONER DWIGHT A. HAMILTON (Colorado):
14 Mr. Chairman, the arguments are getting repetitive. We
15 need to move on. I move the previous question.

16 CHAIRMAN LEINENWEBER: The question has been
17 moved --

18 COMMISSIONER PETER F. LANGROCK (Vermont):
19 Point of privilege. I think I was at the microphone
20 prior to that motion being made. And in the tradition
21 of the conference, a debate is usually allowed -- I
22 don't want to abuse it, but I think the last comments
23 by the last speaker were totally erroneous. I think
24 they need to be corrected and pointed out before we do
25 it. If I may have a short moment, I would like to

1 address those.

2 CHAIRMAN LEINENWEBER: Well, the rules don't
3 provide any reference to guide me by tradition. If it
4 is tradition, I'd ask Commissioner Hamilton if he would
5 yield for Commissioner Langrock. If not, we will take
6 a vote and if the body wishes to hear you, they will
7 vote . . .

8 COMMISSIONER GENE N. LEBRUN (South Dakota):
9 Mr. Chairman, under our rules, the motion for previous
10 question, No. 1, is not debatable, but also is not
11 proper in the Committee of the Whole. It can be a
12 recommendation to the chair, but only advisory.

13 COMMISSIONER LANGROCK: In that case, can I
14 talk?

15 CHAIRMAN LEINENWEBER: Commissioner Langrock
16 on the motion.

17 COMMISSIONER LANGROCK: I am sympathetic with
18 what you said. If you want to write a statute to trace
19 assets, I will work with you on it, and I may fight you
20 on some points. I have no problem with that.

21 What I have a problem -- this is a civil
22 action, not against an asset, but against a person.
23 It's going to publicly declare that that person is
24 involved in a continuing criminal enterprise by a court
25 of my state. And the burden of proof of that

1 declaration that this person is a horrendous criminal
2 is by a preponderance.

3 Now, I suggest to you that the differential to
4 the average citizen out there between a civil burden
5 and a criminal burden is not recognized. If I am
6 indicted or someone else is indicted for -- not
7 indicted -- civil action brought and by a 50 percent
8 burden of proof, you're, in effect, convicting somebody
9 and imposing a penalty. What you are really doing here
10 is not getting at the things you want, but as has been
11 pointed out, is turning the process, a civil process,
12 to reach people civilly that you can't get criminally.

13 If you can get the stuff on a kingpin, get
14 them. But I don't want to change the whole history of
15 the Bill of Rights as to what it takes to get a
16 criminal conviction just because there are some
17 kingpins working out there, any more than I do because
18 there are mass murderers or because there are rapists
19 out there. There are all sorts of dangers. We should
20 keep the basic traditional burden of proof beyond a
21 reasonable doubt.

22 CHAIRMAN LEINENWEBER: There is one other
23 member seeking recognition, Commissioner Hamilton.
24 Shall we --

25 COMMISSIONER DWIGHT A. HAMILTON (Colorado):

1 Well, the motion was proper. It takes a two-thirds
2 vote of the Committee of the Whole. And it is
3 non-debatable.

4 CHAIRMAN LEINENWEBER: The motion is for the
5 previous question.

6 All those in favor, signify by saying "aye."

7 All those opposed.

8 The question is shall Committee Amendment No.
9 7 be adopted.

10 All those in favor, signify by saying "aye."

11 COMMISSIONER DAVID D. BIKLEN (Connecticut):

12 Point of information. I am still unclear as to what
13 the committee is going to do with subsection (c). In
14 order for us to know what we are voting on, is the
15 committee going to entertain motions to amend
16 subsection (c) if this amended motion is adopted?

17 COMMISSIONER DAVID A. GIBSON (Vermont):

18 Commissioner, if the vote is to approve the committee's
19 recommendation for 703, as is being considered right
20 now, we will be back on the floor later and will review
21 the definition of "proceeds" to try to come up with
22 something that is clearer. Yes.

23 CHAIRMAN LEINENWEBER: The question is shall
24 Amendment No. 7, Committee Amendment No. 7 amending
25 Section 703 in various ways, be adopted.

1 All those in favor, signify by saying "aye."

2 All those opposed.

3 The chair is in doubt.

4 All those in favor, please rise.

5 Please be seated. 76 voting "aye."

6 Those opposed, please rise.

7 70 opposed. 76 in favor. The amendment

8 carries.

9 Further amendments?

10 CHAIRMAN LEINENWEBER: Mr. President, the
11 Committee of the Whole rises and reports that it has
12 had under consideration the revisions to the Uniform
13 Controlled Substances Act, has made progress, and asks
14 leave to sit again.

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EIGHTH SESSION

UNIFORM CONTROLLED SUBSTANCES ACT

TUESDAY, JULY 17, 1990

Harry D. Leinenweber of Illinois, presiding.

CHAIRMAN LEINENWEBER: The committee has, as I understand it, four amendments -- Commissioner Langbein of Illinois, however, has an amendment. He has to be off the floor for another official duty, so we will call on Commissioner Langbein for a proposed amendment.

COMMISSIONER JOHN H. LANGBEIN (Illinois): Thank you, Mr. Chairman. I apologize. I appreciate your courtesy in allowing me to speak in advance of the committee. I'm due across the hall, scope and program, right away, which is why I wanted to raise a couple of concerns that I had with the Uniform Controlled Substances Act at this point.

We are now back in the area of Article 4 of the Controlled Substances Act. That's the part which, in all probability, is going to pass and go forward.

There are two issues of policy that I want to raise with the conference as a whole. The first has to do with the phenomenon of mandatory minimum sentences as contained throughout the act. There are a variety of provisions that say that the consequence, the penal or sentencing consequence must be such and such.

1 This is part of a broader phenomenon which has
2 attracted great attention throughout the academic
3 community and throughout the bar and the bench in the
4 study of criminal justice administration.

5 The basic problem with mandatory minimum
6 sentences is that they are inflexible, they are often
7 draconian, and the result is that they lead in two
8 directions, both of which are highly undesirable.

9 On the one hand, because they are often
10 draconian, the result is to frighten people into plea
11 bargaining. They have, in other words, the effect of
12 encouraging people to waive their rights to
13 adjudication and to go ahead and plea bargain out -- in
14 other words, they coerce consent. They could coerce
15 confessions.

16 The recommendation of criminal justice people,
17 very broadly, is that mandatory minimums have been a
18 mistake. They have had the effect, basically, of
19 transferring adjudicative authority from the bench to
20 the prosecutorial establishment. The net effect of
21 having very draconian penalties out there is that you
22 can't afford to take the chance of getting your
23 innocence vindicated, and, therefore, you really move
24 over to striking the best deal you possibly can with
25 the prosecutors.

1 The other difficulty with mandatory minimums
2 is that it's easy to pile them on because you don't
3 have any sense of the relationship that they bear to
4 the larger flow of criminal justice business, and the
5 result is that you get horrific overcrowding. I was
6 told by one of the Connecticut commissioners that they
7 are serving about ten percent of their terms in
8 Connecticut. Thereafter, everybody is being let off,
9 and that this is the kind of overcrowding and so forth
10 which results from mandatory minimums.

11 I do not know of a body of respectable opinion
12 left in this country that favors mandatory minimums in
13 the administration of criminal justice. I would,
14 accordingly, urge the conference to direct this
15 committee that in completing its work, that it delete
16 mandatory minimums. I don't have language that would
17 implement that, but I am sure the gist of it could be
18 implemented.

19 This bill would then go out with all its
20 definitional precision in place, which is the main
21 contribution it is going to make out there in the
22 country, but it would be free of the mandatory minimums
23 which work, I think, to the detriment of good criminal
24 justice administration.

25 CHAIRMAN LEINENWEBER: Commissioner Langbein,

1 are you using the word "urge" as a synonym for "move"?

2 COMMISSIONER JOHN H. LANGBEIN (Illinois): You
3 once again exposed my naivete in matters parliamentary.
4 The answer is "yes." I would move that.

5 CHAIRMAN LEINENWEBER: The motion is that the
6 committee, the sense of the House that the committee be
7 instructed to remove mandatory minimum sentences.

8 On that motion, Commissioner Langrock.

9 COMMISSIONER PETER F. LANGROCK (Vermont):
10 Can't that basically be accomplished by simply striking
11 section (d) on Page 78, which prevents there being any
12 use of probation or parole?

13 COMMISSIONER DAVID A. GIBSON (Vermont): You
14 also need to strike it on Pages 90 and 92 from Sections
15 409 and 410, subsection (f).

16 COMMISSIONER LANGROCK: With Commissioner
17 Langbein's permission, I would move to strike section
18 (d) of 78, on Page 78, and on Page 92, the lines --
19 whatever lines you indicated.

20 COMMISSIONER GIBSON: On Page 90, it would be
21 Lines 1 through 11. On Page 92, again, Lines 1 through
22 11.

23 CHAIRMAN LEINENWEBER: Commissioner Langbein,
24 do you consent to that.

25 COMMISSIONER JOHN H. LANGBEIN (Illinois):

1 Yes.

2 CHAIRMAN LEINENWEBER: The motion then is that
3 the subparagraph (d) on Page 78 be stricken in its
4 entirety, on Page 90, Lines 1 through 11 be stricken,
5 and on Page 92, Lines 1 through 11 be stricken.

6 Commissioner Pixler, on the motion.

7 COMMISSIONER REID C. PIXLER (Colorado): One
8 of the things I want to straighten out initially is
9 that all of this language is bracketed. The purpose
10 for bracketing it is so that the act is complete for
11 all states that would be interested in having mandatory
12 minimums in their particular statute.

13 We are not, in essence, really trying to
14 debate whether mandatory minimums are worthwhile or
15 whether they meet any of these kinds of things that
16 Commissioner Langbein wishes to label mandatory
17 minimums with.

18 I disagree with his premise entirely, but for
19 the first issue I want to just focus on, this is so
20 that the act and the drafters can have it available to
21 them if they wish.

22 Now, there has been an effort to do some
23 legislature research to determine the trends in the
24 country. And to this point in time, this is not a
25 completed study. But 31 states have adopted language

1 of mandatory minimums in their trafficking provisions.
2 There may be more. That is just as far as the
3 legislative survey has gone.

4 To send this act out without providing for
5 that inclusion in the draft so that people that are
6 wishing to include mandatory minimums, I think is
7 irresponsible because it's making a condemnation of the
8 concept of the mandatory minimums which many states
9 believe are successful.

10 With regard to addressing some of the specific
11 concerns about the adjudication and coercion of a
12 mandatory plea, I've heard that kind of criticism over
13 the years for any potentially staggering sentence, that
14 it's coercive. The fact that someone is facing prison
15 time is essentially coercive. That is the consequence
16 of the criminal behavior that led them to be charged in
17 the first place. If there is someone that absolutely
18 believes they are innocent, they are going to litigate
19 that to the fullest.

20 I recognize what we are looking at are people
21 that are charged with offenses of the highest degree of
22 activity on the part of delivering and dispensing drugs
23 and importing them, smuggling them -- the highest, the
24 most offensive kingpin type of individuals.

25 Now, if a state chooses to use mandatory

1 minimums, I think that's totally appropriate. And I
2 think it would be improper for us to simply delete all
3 reference to it -- where the material is bracketed. It
4 doesn't cause any particular condemnation of mandatory
5 minimums or encourage the state to do that. That
6 debate will have to be in each individual state. But
7 to make the act complete, I think it is absolutely
8 necessary.

9 I also dispute the representation that was
10 made that there are no significant bodies of criminal
11 justice people that are in favor of mandatory minimums.
12 The entire federal scheme is changing at the present
13 time. There is support for the sentencing guidelines,
14 which isn't a mandatory minimum, but the federal -- I'm
15 not versed in the mandatory minimum versus the
16 sentencing guideline aspect. I think it would be more
17 expedient if I called upon Harry Harbin to explain to
18 you how the Department of Justice and the federal
19 procedure has been changing from the concept of the
20 mandatory minimums to the more restrictive federal
21 guideline sentences.

22 CHAIRMAN LEINENWEBER: Mr. Harbin. By the
23 way, before we go on, there is also, I have been
24 advised by Chairman Gibson, another provision which
25 needs to be stricken, so we will include at Page 93,

1 Lines 15 through 25, in the motion.

2 Mr. Harbin.

3 MR. HARRY HARBIN: The sentencing guidelines
4 are a relatively new innovation in federal law that
5 postdate the enactment of mandatory minimums for
6 serious federal drug-trafficking offenses.

7 The interesting aspect of the sentencing
8 guidelines is that they result in sentences that are
9 even more severe than what the mandatory minimums are
10 under the statute for drug-trafficking crimes.

11 The other interesting aspect of them is that
12 they apply to all federal crimes, not just drug crimes,
13 and create a scheme of determinate sentencing that
14 varies upwards and downwards with factors such as the
15 severity of the crime, factors -- perhaps mitigating
16 factors giving the defendant's background, but still
17 result in jail terms for all serious federal crimes.
18 That applies across the board, not just limited to drug
19 crimes. That is the scheme in place today. It's a
20 scheme that is being utilized and has received, I
21 believe, the endorsement of many bodies. It is being
22 examined in a number of states.

23 One other thing I would like to add, and that
24 is this idea that there is no body of respectable
25 opinion that supports mandatory minimums. I'm not

1 asking you to look at what prosecutorial groups. What
2 I would refer you to is the handbook, the blue handbook
3 that was put out on the Controlled Substances Act. If
4 you look at Pages 110, 111, thereabouts, you will see
5 judicial quotations upholding the federal scheme of
6 mandatory minimum sentences as rational, as not
7 involving undue violation of the separation of powers
8 doctrine, as not unduly inhibiting judicial discretion.
9 These aren't prosecutors. These are generally the
10 courts of appeal speaking.

11 I submit to you that at least I have enormous
12 respect for the federal courts of appeal and what they
13 have said in upholding the mandatory minimum sentencing
14 scheme.

15 To underscore what Mr. Pixler said, what you
16 have before you in the UCSA is bracketed language. It
17 gives states the right to consider mandatory minimums.
18 If they feel that because of conditions like prison
19 overcrowding and the like, that they can't do it, it
20 gives them the chance to enact alternative language
21 which avoids the mandatory minimum sentencing scheme.

22 CHAIRMAN LEINENWEBER: Commission Meiklejohn.

23 COMMISSIONER ALVIN J. MEIKLEJOHN, JR.

24 (Colorado): Thank you. My disrespectful opinion is
25 that this conduct of trafficking drug dealers is so

1 egregious that states are going to want to use some
2 mechanism like mandatory sentencing. Here it's
3 optional in this bill. I think that's the way we ought
4 to send it out of here so that they have got the proper
5 language if they want to use it, because most state
6 legislatures are.

7 I tell you, this conduct is so egregious, so
8 damaging to society, just such misery and pain and cost
9 coming out of it, we need to send something that's
10 well-written because it's going to happen that if we
11 don't send it out with this provision in it,
12 legislatures will write it themselves.

13 CHAIRMAN LEINENWEBER: Commissioner Langrock.

14 COMMISSIONER PETER F. LANGROCK (Vermont): I
15 like judges, I trust judges. I was asked to serve, and
16 I did serve, on the Defense Advisory Committee on the
17 Federal Sentencing Guidelines.

18 I can assure you that there was absolutely no
19 respected input from that side of the bench or that
20 side of the bar. The mandatory guidelines of the
21 sentencing guidelines of the federal courts have had a
22 disastrous effect on the federal system, as I see it.

23 Let me try to explain some of the matters.
24 One is, it forces a federal judge on many occasions to
25 put a person in jail where that judge does not believe

1 it is in the interest of that person or society to put
2 that person in jail.

3 We have a rather conservative judge in
4 Vermont, Franklin S. Billings. The other day he had to
5 sentence somebody to jail. The front page of the paper
6 said: I am handcuffed. This is wrong. I don't want
7 to send this person to jail. I would not do so. I am
8 forced to do so.

9 Maybe, in the wisdom of the legislative halls,
10 they know better about what is going to happen in the
11 future and they can take away the discretion of the
12 judge in a positive fashion. I don't believe that's
13 the case.

14 The other problem you have in that -- the
15 opposite phenomenon of what Professor Langbein
16 suggested. When you get into mandatory minimums, you
17 can't have plea bargaining. In the federal system, I
18 tried more cases, defended more criminal cases in the
19 federal sytem in the past year than I have in my entire
20 career, because there is nowhere else to go. You have
21 nothing to lose by trying.

22 The third effect is, you are increasing the
23 people going to jail. You are going to need bigger and
24 bigger facilities at greater and greater costs, or do
25 what you do, and that's prorate it, cut it back, and it

1 becomes meaningless anyhow.

2 When you impose the system which is basically
3 an outgrowth of what's happened in the federal system
4 upon the states, you are going to have a triple
5 phenomenon which I think is disastrous.

6 No. 1, you will have cases of gross injustice.
7 No. 2, you are going to increase the number of trials
8 because there is no place to go. And 3, you are going
9 to impose a cost on the correctional system which is
10 beyond calculation here.

11 The whole premise of this -- I mean, nobody is
12 giving a rational reason why. What you are saying is
13 that our judges aren't smart enough to fit punishments
14 for the crime based upon statutes. We therefore must
15 take this away from them and must put it in the
16 legislature. This is basically a policy of
17 retribution. We are in this panic mania that this is
18 such a horrendous situation that we must do anything.
19 Whether it's rational or thoughtful is immaterial.

20 I suggest to you that this conference
21 shouldn't send it out. I am not saying it's the end of
22 it. There are going to be people in the legislature --
23 if the states want to do it, there are going to be
24 people out there doing it.

25 But this conference should not put its mark

1 and say this is an acceptable thing of anything which
2 is so anti the tradition of our whole system of
3 justice, of judicial discretion, with costs being
4 imposed upon the states both from an emotional and a
5 financial standpoint.

6 COMMISSIONER MICHAEL D. HAWKINS (Arizona): I
7 rise not to speak in favor of mandatory minimum
8 sentencing or against it, but in favor of the notion of
9 maintaining this act as a uniform act.

10 If it's sent to the states, it seems to me,
11 from a two-year veteran, if it's not a contradiction of
12 terms of this body -- I don't know what the history
13 is -- but it seems to me if we send this act out to the
14 state legislatures without this option, it's obvious
15 that many of them will attach this back on. If that
16 option is not available to them, then they will, by
17 that act, be making it a nonuniform act and we will be
18 defeating our purpose.

19 I think it is entirely appropriate to leave to
20 the judgment of state legislatures whether they wish to
21 do that. We are right on the border with Mexico, and
22 cocaine and heroin and other substances are readily
23 available to kids from the time they are about in
24 second grade, because they are only, in the case of
25 Tucson, 90 miles away from an international border. We

1 may choose a more stringent system of punishment simply
2 to make sure that people who might be thinking about
3 engaging in that behavior would not engage in it.

4 It seems to me that's an option that ought to
5 be left to the various state legislatures. If Vermont
6 or Minnesota or Wisconsin chooses not to enact them for
7 good and sound policy reasons, some of which the
8 Commissioner from Vermont has identified, then, fine,
9 don't do it.

10 CHAIRMAN LEINENWEBER: Commissioner Baggett.

11 COMMISSIONER BRYCE A. BAGGETT (Oklahoma):
12 Ladies and gentlemen. I will begin that way because I
13 was admonished that I forgot the distaff yesterday.

14 First, to the point about bracketing.
15 Although bracketed material is less of a recommendation
16 of this conference than is our unbracketed material, it
17 nevertheless constitutes a policy recommendation by
18 this conference, with the caveat that this is an
19 alternative, but it's an acceptable alternative.

20 If we have questions about the wisdom of this
21 alternative, it should not even appear as bracketed
22 material. Let's get clear about exactly what issue is
23 at stake in the Langbein motion. It is not whether
24 there will be discretion as to sentencing, but where we
25 will place that discretion.

1 The act as it is places that discretion in
2 legislatures -- politically elected men and women who
3 must make that decision under political pressure.

4 The proposal of the Langbein motion will
5 invest that discretion in our judges, who hopefully are
6 not subject to the same political question about the
7 concerns of the next election. At least we would hope
8 it is so, in this best of all possible worlds.

9 There are many, many different ways that these
10 mandatory sentences and withdrawal of the judicial
11 power to suspend or defer sentences can apply
12 unequally. One example should bring this clearly to
13 your mind. As the Commissioner from Colorado said, the
14 outrageous and egregious behavior of the kingpin drug
15 dealer -- hell, yes, we want him locked up, throw away
16 the key, don't give him a chance.

17 But what about the person who has a very
18 remote and tangential connection but nevertheless a
19 sufficient connection to a conspiracy -- you know, the
20 girl who answered the telephone regularly and
21 recurringly so as to become part of the conspiracy and
22 subject by the provisions of this act to the maximum
23 punishment.

24 Do we not have at least the capacity to figure
25 that one of those minor participants in a conspiracy

1 should be subject to a lesser punishment?

2 Consider also the effect of your solicitation
3 or attempt provisions in this act. A solicitation or
4 an attempt is classified as equivalent of the crime
5 itself. Are there not some conditions conceivable to
6 your mind where it would be appropriate for such a
7 person, such an accused, to be eligible for and worthy
8 of consideration for deferral or suspension of
9 sentence?

10 Now, something has been said about the
11 efficaciousness of mandatory sentencing. Ladies and
12 gentlemen, of course it's effective -- if punitiveness
13 and retribution is your only purpose. But if that's
14 what you want to do, let's really get effective and go
15 to capital punishment for every offense. It is more
16 effective. If more effective is what you want, we can
17 get that in a hurry.

18 CHAIRMAN LEINENWEBER: Commissioner Wilbert.

19 COMMISSIONER PAUL L. WILBERT (Kansas): Mr.
20 Chairman, after having been in this conference since
21 1954 and having practiced law 52 years, I have finally
22 come to the conclusion that the best thing that you can
23 do for any committee that's trying to promulgate honest
24 acts is to get a perspective.

25 Now, if you start out with the right

1 perspective, then your exhortations will have some
2 sense. What bothers me is, none of the people who have
3 not been supporting the committee have any common
4 sense.

5 [Laughter]

6 COMMISSIONER WILBERT: This really bothers me.
7 I know that I have a voice like a velvet fog and that I
8 am going to lose this thing if it is based on the
9 ground of volume. Because my decibels are way down
10 low. And I am not running for Congress.

11 But what I have got to say is, I have been
12 here ever since they started considering this bill. I
13 am not a late comer. I have sat through this thing,
14 and I have absorbed about all I can absorb of
15 emasculation of this act. I'm sick and tired of it.
16 I'm not going to let the academics and the defense
17 attorneys have their way in this conference on this act
18 any longer.

19 Now, they may get their way, but it's going to
20 be over my opposition. I'm against the motion. I'm
21 against all the liberality and the emasculation that
22 has gone on. I wouldn't even have done away with the
23 forfeiture, but I understand all of that jazz.

24 Now, I was on the Uniform Sentencing Act. I'm
25 sorry that some of you youngsters around here don't

1 recognize the fact that this conference promulgated --
2 there is Brother Perlman going to get up right away.

3 [Laughter]

4 COMMISSIONER WILBERT: Old Brother Perlman
5 from Nebraska. He and I fought this thing through from
6 San Antonio to New York to everyplace else on the
7 Uniform Sentencing Act. I want to tell you that the
8 Uniform Sentencing Act says you "is" going to put them
9 in for one year. You "is" going to put them in for 12
10 years. The United States district judges don't like it
11 at all. But, by golly, they finally got it in the
12 federal system, and they are going to have to do it
13 whether they like it or not.

14 We took the discretion away in the Uniform
15 Sentencing Act, so don't tell me that you didn't know
16 that this conference ever had anything to do with
17 mandatory sentencing. It just ain't true.

18 Okay. I said that. The thing that you always
19 forget is that you are not dealing with the Boy Scouts
20 of America. You are dealing with an entirely different
21 thing. And you know, it just renders my guts -- I get
22 sick when I see on TV these cocaine babies in these
23 hospitals. They show them, and you just -- you damn
24 near die. You feel sorry for all of these people, but
25 you feel sorry for all of the money it's going to cost

1 us to deal with these kids.

2 What I'm trying to say is, there is no
3 perfection on this earth. Every act we have ever had
4 in this damn conference is going to bother somebody.
5 Somebody is going to get hurt a little bit.

6 So, Langrock, old Peter, he is the busiest
7 lawyer in the United States. He's got more
8 illustrations about what happens to his people. That
9 may be true. But there is always an exception. I told
10 old Peter yesterday, I said: You wouldn't have to
11 worry about these people if they just obeyed the rules.

12 [Laughter]

13 COMMISSIONER WILBERT: Why the hell do I have
14 to obey the law if Peter's citizens don't? And they're
15 poor criminals.

16 All you have to do is be self-disciplined,
17 like Socrates says. The greatest freedom is the
18 freedom of self-responsibility. If you would all take
19 your own self-responsibility, you'd be all right. But,
20 no, you want to abandon the rules and say: I can get
21 by with it.

22 What this committee has tried to do for this
23 conference -- and I don't like to see this act
24 emasculated any more than it is -- you have got to send
25 a message out: Hell, yes, we are tough. And if you

1 even get close to a piece of cocaine, it's your neck.
2 And if you haven't got enough damn sense to stay away
3 from the cocaine, then you are going to get your butt
4 in the fire.

5 You know, I hated to do this because there has
6 been so much bull in this act since Saturday -- I hated
7 to do this. I'm not going to go home to Kansas and let
8 all of these academics and old Peter say -- emasculate
9 this thing any more.

10 I say vote down this motion, let's get this
11 act as it is passed, and go home and determine for
12 yourself that you finally told them, all of the drug
13 people, if they get to sniffing it, to go to hell.

14 CHAIRMAN LEINENWEBER: Commissioner Reitz.

15 COMMISSIONER CURTIS R. REITZ (Pennsylvania):
16 That's a tough act to follow. We have been debating
17 most of this motion, or most of the debate about the
18 motion has been, I think, somewhat misdirected by the
19 false label "mandatory sentencing."

20 The language that you are looking at is not a
21 mandatory sentencing -- not mandatory sentencing any
22 way that I would understand it, at least. The language
23 that our chairman Gibson has identified, that the only
24 language under debate is the language that would
25 withdraw one sentencing option from the sentencing

1 court, the option of probation. That is not a
2 mandatory sentencing provision in anything except to a
3 very limited extent. There are mandatory sentencing
4 provisions in this act in the language of "must" that
5 appears in the sentencing provisions that direct a
6 sentence of prison and fine for a whole series of
7 crimes.

8 Those are not presently in the motion. The
9 motion is only to strike language that deals with
10 withdrawing the option of probation.

11 Let me say about that language, that language
12 is rather old-fashioned language in criminal law. In
13 many places, probation appeared as a kind of stepchild
14 in sentencing. The only way you could impose probation
15 was as a secondary sanction by suspending sentence.
16 Modern sentencing law does not use that concept at all.
17 Probation is recognized in the sentencing world as a
18 sentence itself and not something to be imposed as a
19 matter of suspension of another sentence.

20 This language that we are talking about is
21 archaic language dealing with the way some states still
22 use probation, but it is not, I assure you, it is not
23 the guts of the issue of mandatory sentencing, which is
24 not in this language.

25 CHAIRMAN LEINENWEBER: For what reason does

1 Commissioner Langbein rise?

2 COMMISSIONER JOHN H. LANGBEIN (Illinois): To
3 make it clear that the sense of my motion is not only
4 to deal with probation provisions, but also to state
5 that it is my understanding that -- the gist of my
6 motion is that where the term "must" appears throughout
7 the sentencing provisions in Section 401(b) and
8 elsewhere in the act, that it be struck in favor of the
9 other bracketed term "may."

10 CHAIRMAN LEINENWEBER: Commissioner Ring.
11 Excuse me. Could Commissioner Gibson interject
12 something at this point.

13 COMMISSIONER DAVID A. GIBSON (Vermont): I
14 took Commissioner Langbein's motion as including all of
15 those references to the word "must," where they appear
16 in brackets, and they appear in brackets from Pages 72
17 through 77 in about 21 different lines. So that if
18 this motion is approved, it would be my expectation
19 that we would remove the word "must" and the brackets
20 around the word "may." Currently those provisions have
21 "upon conviction" provisions, that the person convicted
22 may or must be imprisoned for blank number of years and
23 not more than blank number of years.

24 It would read in those provisions, instead of
25 the bracket "may," bracket "must," just the word "may."

1 CHAIRMAN LEINENWEBER: Commissioner Ring.

2 COMMISSIONER CARLYLE C. RING (Virginia):

3 Those of us who have had the pleasure of serving as
4 president of the conference maintain a very special
5 file that we will never throw away. Those are the
6 letters from Commissioner Wilbert. We figure that in a
7 few more decades, they will be invaluable historic
8 pieces.

9 I do want to say very briefly that we have
10 obviously touched upon a very emotional and very
11 sensitive issue. Those who would support this motion
12 obviously feel very strongly about it, so much so to
13 postulate their arguments on the basis that no rational
14 person could have the other point of view.

15 Similarly, those that would favor mandatory
16 sentencing would say that those who are proposing this
17 motion lack in common sense.

18 I think that's a tip-off. It's a tip-off that
19 we are now in an arena where this body is not going to
20 make the decision. It is a topic that is in the public
21 forum and is ultimately going to be decided in the
22 public forum by elected representatives in each of the
23 states.

24 In that context, I think the Drafting
25 Committee has very wisely put it in brackets, and they

1 have made the choice very clear. They put a bracket
2 around "must." They put a bracket around "may."

3 They are not recommending one way or the
4 other. If your state believes in this emotionally
5 charged argument that there should be no mandatory
6 sentences, they select the word "may."

7 In this area where reasonable people can
8 differ -- and I think there are reasonable arguments on
9 both sides, it is not a one-sided argument -- if
10 reasonable people within that particular state think
11 there ought to be a mandatory sentence, they select the
12 word "must." And that's exactly where this conference
13 ought to be. Let it be decided where it should be
14 decided. We are providing the alternatives.

15 CHAIRMAN LEINENWEBER: Commissioner Perlman.

16 COMMISSIONER HARVEY S. PERLMAN (Nebraska): I
17 couldn't resist when Commissioner Wilbert got up. At
18 least there is a distinction between what this
19 conference approved in the Model Corrections and
20 Sentencing Act and mandatory sentencing, and a
21 difference between that and the federal guidelines.

22 The guidelines, which we approved, basically,
23 really are directed at protecting against disparate
24 sentencing and does reduce the discretion considerably
25 of judges in terms of selecting sentences all up and

1 down the spectrum of sentencing.

2 Mandatory sentences in this act are just
3 halfway measures. We give the judge wide discretion,
4 but say: No, on this end of the discretion, you can't
5 do something.

6 I think that's a mistake. You can go one way
7 or the other, it seems to me, but I think it's a
8 mistake to kind of go half way.

9 CHAIRMAN LEINENWEBER: Commissioner Langbein,
10 to close.

11 COMMISSIONER JOHN H. LANGBEIN (Illinois): The
12 consensus is very broad in favor of the position that I
13 am representing. Let me just read to you the language
14 of the Federal Court Study Commission which reported
15 this April. This was a committee appointed by Chief
16 Justice Renquist, included the head of the Justice
17 Department's Criminal Division, Edward Dennis. It
18 included Judge Posner, Judge Weis, Judge Cabranes,
19 Congressman Kastin Meier and others.

20 Their recommendation was, throughout federal
21 law, to repeal the mandatory minimums. And the
22 reasoning given was that these frustrate the goal of
23 rational and consistent sentencing procedures, that
24 they hamstring prosecutors and judges by making it
25 difficult to provide incentive that will induce the

1 defendent to plead guilty on the one hand.

2 Another ground given was that when that
3 doesn't fail, they then have excessive pressures to
4 plead guilty, so that you have the worst of both
5 worlds.

6 But there is a very broad consensus which is
7 not particularly confined to any one view. This is not
8 just school teacher stuff. This is federal courts,
9 this is judges themselves having these case loads that
10 are affected by this.

11 The question is not whether we are going to be
12 tough or lenient. I am perfectly willing to be as
13 tough as anybody else on people that you catch who
14 really deserve to have the book thrown at them.

15 We had a case reported from California just
16 lately where Judge Schwarzer, who is one of the
17 toughest federal judges around, was in tears because of
18 having to impose mandatory imprisonment upon somebody
19 whose involvement with a narcotics deal was extremely
20 innocuous. He had given somebody a ride and probably
21 knew what was up but was not deeply involved, and broke
22 up a family in the process.

23 These mandatory minimums have that result.
24 The conference ought not to be in a position of
25 facilitating something which is in such substantial

1 disrepair throughout -- disrespect -- throughout the
2 criminal justice administration. This is not just a
3 drug issue.

4 I appreciate the argument, well, let's just
5 put our brackets around it and let people decide.
6 That's an illusory argument, ladies and gentlemen.
7 When you put the conference's imprimatur on mandatory
8 minimum sentences, you have said we think this is an
9 okay thing to be doing.

10 Now, if jurisdictions want to do it, they want
11 to do something dumb, of course they can do it. But
12 the question is, are you going to facilitate it by
13 allowing legislators who are under the gun to stand up
14 and say: Why, the Uniform Law Conference recommends
15 this kind of conduct.

16 I would urge you to abstain from that and to
17 go ahead and delete the mandatory minimums. Thank you
18 for your attention.

19 CHAIRMAN LEINENWEBER: Commissioner Braun.

20 COMMISSIONER RICHARD L. BRAUN (North
21 Carolina): Yes. I would like to respond to a number
22 of these various charges that have been raised by the
23 proponents of the motion.

24 In the first place, the various statements of
25 fact are actually statements of the opinions of the

1 proponents. They really are not fact at all. I think
2 it's time that we start looking at the real facts.

3 There is no broad consensus. The study
4 commission that Commissioner Langbein refers to
5 recommended also that the federal guidelines be
6 continued. And there was a strong dissent to anything
7 regarding the minimum sentences.

8 Furthermore, not only the "may" and "must" are
9 bracketed, but the entire section is bracketed. So,
10 the entire section doesn't have to be in there if the
11 state feels that it is inappropriate.

12 In fact, however, there is a very strong
13 movement among the states, among not only judiciary,
14 but -- excuse me -- not only among legislators, but
15 among lawyers and the public to adopt legislative
16 guidelines to establish even stricter minimums than are
17 included here.

18 Furthermore, the minimums are not specified.
19 A state can make these minimums as little as it feels
20 proper. And don't forget, it also imposes maximums.
21 Certainly it's restricting judges' wide discretion
22 somewhat. That should be done, and it is being done in
23 most states.

24 The purpose is not so much to coerce guilty
25 pleas, although Commissioner Langbein says it will

1 increase guilty pleas. Commissioner Langrock says it
2 will increase trials. I don't know whether they can
3 somehow reconcile those two views. The fact is that
4 many states have this type of minimum, and it works
5 very well. And many more states are switching to the
6 sentencing guidelines that establish minimums for every
7 single crime.

8 Finally, I wanted to point out that these
9 minimums apply only to serious offenses, to trafficking
10 offenses, so they are not even offered for the run of
11 the mill buy, sell, possession of the street dealer or
12 the casual drug user.

13 It seems to me that to put it in here is good
14 policy. We have debated this. As I recall, there was
15 almost a unanimous vote in the committee in favor of
16 what we ended up with.

17 I feel very strongly that we should have the
18 option of mandatory minimums. And if the state doesn't
19 want it, they don't have to take it.

20 MR. HARRY HARBIN: Harry Harbin, adviser to
21 the committee. On the Federal Sentencing Commission,
22 there is a letter in the back on the table there from
23 my boss, Ed Dennis, Assistant Attorney General of the
24 Criminal Division. In a document put out by the NACDO,
25 the Criminal Defense Lawyers Association, there was a

1 statement made that the Department of Justice favors
2 the repeal of mandatory minimums.

3 The letter explains, as Mr. Braun said, that
4 what the commission said that Ed Dennis served on, that
5 we disfavor mandatory minimums, but it voted to
6 continue the sentencing guidelines which, as I
7 explained earlier, are even more severe than the
8 mandatory minimums.

9 Mr. Dennis objects to what was said in the
10 NACDO letter and concludes his letter by saying: I am
11 deeply disturbed by the apparent lack of candor to the
12 Commissioners of the National Conference on Uniform
13 State Laws on this issue of critical importance to
14 state law enforcement.

15 Mr. Dennis asked me to make that clear to the
16 conference, exactly what the committee that he served
17 on did. He explains why he did not dissent -- a
18 collegial body just like this, that people don't make
19 lengthy and long dissents to what the decision of the
20 committee is.

21 He was on that committee, it's true. To infer
22 because he was in attendance at that committee that the
23 Department of Justice favors a repeal of mandatory
24 minimum sentences is simply wrong.

25 CHAIRMAN LEINENWEBER: Commission Langrock.

1 COMMISSIONER PETER F. LANGROCK (Vermont):

2 Very brief. In response to your comments before, if
3 I'm not mistaken, the experience, according to Judge
4 Beam, in his district, is that jury trials have gone up
5 300 percent since the imposition of these federal
6 sentencing guidelines.

7 I believe Minnesota has had a similar
8 experience. The coercive power -- and this is the
9 reconciliation -- is, instead of talking about the --
10 you don't talk about a sentence. You talk about a
11 bargaining of charges. And, for reason, it can have a
12 coercive affect. The overall effect of passing this in
13 any state is going to be to increase jury trials,
14 increase prison days, and increase costs.

15 What I am concerned about is, legislators can
16 use the hyperbole of saying: Yes, we are getting tough
17 on crime -- not back it up with real dollars for the
18 prisons, for the correction system, not worry about
19 fairness within it, because they are removed from it,
20 and, in effect, undermine what is really happening and
21 the real image of justice. I think it is hypocritical
22 to say we sentence somebody to ten years in jail and
23 they are out in one year because of prison crowding.

24 I'm not going to reargue the points I made,
25 but I did want to try and reconcile those two things

1 and bring before you what is actually happening.

2 I will tell you right now, my own opinion in
3 this matter is that if we pass this, we will be back
4 here three years or five years later to remove it. For
5 once, the pendulum has already started to swing away
6 from this. There are lots of things out there in the
7 hinterlands of the legislatures talking about this,
8 because it's a great time to get tough on crime. The
9 actual rational economic effects of this are so
10 negative that we are going to see less and less of it
11 and repeal for it. I think we should not put our
12 imprimatur on it at this point.

13 COMMISSIONER GARY R. GEORGE (Wisconsin): I
14 would like to support the motion. I think that
15 mandatory minimums in fact are an insult to the
16 judiciary. I think it's clear that a judge ought to be
17 able to take into consideration a number of factors.

18 From a legislator's standpoint, and being a
19 member of the legislature here in this state, when we
20 considered this issue, we did it within a context, the
21 context being that it's not just enough to say we are
22 going to lock somebody up for a year. We did it within
23 the context of a major criminal law drug bill where we
24 took into consideration the social services that will
25 go with the prison terms.

1 But more importantly, I think, for a
2 legislature, you have got to take into consideration
3 the costs of just saying we are going to lock people
4 up.

5 Take a look at California right now with a \$3
6 billion-plus deficit, where, according to one of the
7 Commissioners here, they are locking people up in
8 California at the rate of 350 per week.

9 To suggest that we are going to put within a
10 major piece of legislation a minimum sentence which
11 will without a doubt increase prison populations at a
12 cost of millions of dollars -- in some cases, probably,
13 over time, billions of dollars -- without a reference
14 to how you are going to pay for it, I don't think that
15 is responsible.

16 Any state that wishes to make a policy
17 decision that they want a minimum sentence can do that,
18 I think, within a broader context of the criminal law,
19 without doing it within this context. I think people
20 will, if they are a proponent for minimum sentences and
21 want to automatically go with this and say, "Look, the
22 Uniform Conference thinks it's a good idea, it's the
23 national trend, let's just do it" -- I think it's too
24 important to just include it that way. I would like to
25 see it out, and I would support that motion.

1 CHAIRMAN LEINENWEBER: Commissioner Gibson.

2 COMMISSIONER DAVID A. GIBSON (Vermont): At
3 the risk of extending debate unduly, I would like to
4 point out that during the committee deliberations, we
5 did have substantial support for not having any
6 mandatory minimum provisions in the act. There was
7 substantial support for having mandatory minimum
8 provisions that were not in brackets.

9 In the course of our deliberations, we,
10 remember, recognized that there was substantial support
11 among the various states to have mandatory minimum
12 provisions. With that realization, the members
13 compromised their differing viewpoints and decided to
14 put them in, but to bracket those provisions to leave
15 it up to each state to have a choice, which is
16 contemplated in the rules governing the drafting of
17 these acts. It is for that reason that you have this
18 provision before you.

19 I would like to also point out, in Section
20 402, there is a provision in subsection (e) that does
21 permit suspension of any sentence that otherwise would
22 be a mandatory minimum when the individual who is
23 convicted provides, quote, substantial assistance in
24 the identification, arrest or conviction of any person
25 for violation of this act. So, there is a prospect for

1 somebody who might otherwise serve a mandatory term of
2 imprisonment to avoid that result by complying with the
3 requirements of subsection (e) in so doing.

4 This provision does not apply to the other
5 sections that have been identified, namely, 409, 410,
6 and 411, but it does apply to violations of Section
7 402.

8 CHAIRMAN LEINENWEBER: Commissioner Burdick.

9 COMMISSIONER EUGENE A. BURDICK (North Dakota):
10 I would like to endorse everything that Connie Ring
11 said about this matter. I think it would be helpful in
12 the comments if the committee would emphasize, which
13 they have not done, that this is provided to the states
14 as an option. The option feature of it is not as
15 strongly expressed in the comment as I would like to
16 see it.

17 Since this is nothing mandated to any state,
18 the conference is silent as to whether it should be
19 mandatory or operational, it seems to me that what the
20 committee has done is provided a fair solution, and I
21 support the committee.

22 CHAIRMAN LEINENWEBER: Commissioner Cramer.

23 COMMISSIONER M. MICHAEL CRAMER (Maryland): It
24 seems to me that most states have sentencing guideline
25 acts. The area where I practice, the three, four

1 states immediately surrounding it, have sentencing
2 guideline acts.

3 I have two questions. One, why don't we leave
4 this to the sentencing guidelines? And two, have you
5 considered that there could be damage done to
6 sentencing guidelines by enacting or having a state
7 enact these mandatory minimum provisions. For
8 instance, just one of many examples, you know that the
9 federal sentencing guidelines mean anybody that touches
10 drugs goes to jail. You have the gridwork, and you
11 come around, and after you finish going through it, you
12 go to jail.

13 Also a provision, however, by the by, that if
14 you cooperate with the government a year later, or even
15 longer than that, the judge can come back and revoke
16 the mandatory sentencing guidelines. You are aware of
17 that.

18 It seems to me that if you are having this in
19 here -- which may be valid -- maybe we have to treat
20 this massive social illness by a massive assault. But
21 it might be doing more damage to an existing statutory
22 structure that many states have.

23 So, my question is: How do you address the
24 issue of sentencing guidelines in this act compared to
25 extant sentencing guidelines throughout the country?

1 What damage can it do?

2 COMMISSIONER RICHARD L. BRAUN (North
3 Carolina): I could respond very briefly to that.
4 Basically, if the state has sentencing guidelines, they
5 are not going to also establish mandatory minimums or
6 maximums because they are already established in the
7 guidelines. And that's another reason we put it in
8 brackets, was to give the states that discretion.

9 I think it would be most unlikely that a state
10 would adopt minimums and the sentencing guidelines,
11 because they would be in conflict. Usually the
12 sentencing guidelines are tougher than the minimums
13 that are established.

14 COMMISSIONER CRAMER: At least the federal
15 sentencing guidelines are.

16 CHAIRMAN LEINENWEBER: Commissioner.

17 COMMISSIONER PETER J. DYKMAN (Wisconsin):
18 Speaking only to whether this is really a neutral,
19 50/50 proposal, take it or leave it, bracket it or not.

20 I worked for the legislature reference bureau
21 in Wisconsin. Anything that is bracketed, it is much
22 more likely that just the brackets come off than the
23 section comes out.

24 So, the posture that this committee is in,
25 that I believe would be true for all drafting agencies

1 in the nation, is that the conference is recommending
2 this, the brackets say that you don't have to have it,
3 but it is most likely in drafting that the brackets
4 would just come off and the text would stay.

5 I think if you have to overcome that, if you
6 want to make it a 50/50 proposition -- it is either
7 through, like Judge Burdick said, through a very strong
8 comment to make sure that it's really an "either/or,"
9 but I think the result you are going to get here is a
10 proposal that the conference is supporting the idea
11 that's in the brackets, though it is not mandatory. It
12 is not a 50/50 situation. You have not compromised it
13 50/50 in this committee.

14 CHAIRMAN LEINENWEBER: There is one more
15 Commissioner standing seeking attention. I intend to
16 call the question after he speaks.

17 COMMISSIONER JAY A. RABINOWITZ (Alaska): Just
18 two quick points. One, in all due deference to
19 Commissioner Wilbert, the 1978 Model Sentencing Act did
20 not provide for mandatory minimums. This conference
21 adopted the philosophical position that just deserts
22 should control and gave great flexibility to the
23 sentencing judge.

24 Two, and I will call on Professor Reitz to
25 elaborate, the ABA's position in their criminal

1 standards is a flat position against mandatory minimum
2 sentences.

3 CHAIRMAN LEINENWEBER: The question is, shall
4 the committee be instructed to eliminate the mandatory
5 sentence option which is presently bracketed in the
6 act, specifically to strike Paragraph 401(d), which is
7 located on Page 78, Lines 1 through 11 on Page 90, 1
8 through 11 on Page 92, Lines 15 through 25 on 93 -- and
9 I have been advised that Article 4 is larded with
10 "may," "must's," and the "must's" come out.

11 All those in favor of the motion, signify by
12 saying "aye."

13 All those opposed.

14 The Chair is in doubt.

15 All those in favor, please rise.

16 All those opposing the motion, please rise.

17 54 voting "aye." 84 opposing. The motion
18 fails.

19 We will now move to the committee amendments.
20 Committee Amendment No. 1, Chairman Gibson.

21 COMMISSIONER DAVID A. GIBSON (Vermont): You
22 should have at your seat the document entitled
23 "Amendments to Uniform Controlled Substances Act 1990,"
24 dated July 17, 1990, consisting of four amendments that
25 the committee is recommending to this act.

1 The first one relates to Section 605, which
2 was dealt with yesterday also.

3 Following the discussion in the conference,
4 the committee determined to make further amendments to
5 Section 605. You will see those in the striking at
6 Lines 13 and 14 on Page 1 and the striking of language
7 in Lines 18 through 22, where we decided not to include
8 any language as to where burden of proof or producing
9 evidence relating to any exemption or exception was to
10 be otherwise included.

11 It was the feeling of the committee that this
12 type of language was unnecessary, that states should
13 have a body of law relating to this particular issue,
14 and that we did not wish to confuse that body of law
15 within the several states.

16 Subsection (c) also has been further revised
17 so that we responded, we hope, to the criticisms that
18 were made yesterday. Starting at Line 23, it now reads
19 that: "No civil or criminal liability is imposed by
20 this [Act] upon any authorized state, county, or
21 municipal officer, engaged in the lawful administration
22 or enforcement of this [Act]."

23 You will note that the new language has the
24 double underline in it, even though it may be a
25 strike-through. If it has double underlines, the word

1 is included in the act.

2 CHAIRMAN LEINENWEBER: Is there discussion on
3 Amendment No. 1?

4 Since there is none, all those in favor,
5 signify by saying "aye."

6 Opposed.

7 The "ayes" have it. Amendment No. 1 is
8 adopted.

9 Amendment No. 2, Chairman Gibson.

10 COMMISSIONER GIBSON: Also following the
11 discussion yesterday, the sense of the committee was
12 that the conference did approve the concept, if not the
13 way in which it was included, of a statement that
14 medical and scientific use of controlled substances was
15 not to be precluded by any of the provisions in it.

16 We therefore are recommending the addition of
17 a new section which would go in Article 6. We
18 anticipate Article 6 would be renumbered to Article 5.

19 New Section 608, found at Lines 5 through 8 on
20 Page 2 of the amendments, reads as follows: "This
21 [Act] does not preclude the medical and scientific use
22 of controlled substances that are necessary for public
23 health and general welfare."

24 CHAIRMAN LEINENWEBER: Commissioner on my
25 right.

1 COMMISSIONER PETER J. DYKMAN (Wisconsin):

2 Could you tell me what this does.

3 COMMISSIONER GIBSON: The purpose of this
4 particular language, which is found in the
5 administrative and enforcement provisions of Article 6,
6 is to emphasize for those administering the act that
7 the legitimate medical and scientific use of controlled
8 substances is to be recognized and to serve as a caveat
9 to those who are administering and enforcing the act to
10 make sure that they don't interfere with that process.

11 COMMISSIONER DYKMAN: I would like to
12 continue. What this does, I believe, is saying that
13 everything in this act, everything we have done does
14 not apply to the medical and scientific use of
15 controlled substances that are necessary for public
16 health and general welfare.

17 I understand that there could be other law
18 prohibiting me from doing something along these lines,
19 but this says that if I am using a controlled substance
20 that is necessary for public health and general
21 welfare, conducting my own experiment, let's say, on
22 the use of controlled substances to control AIDS or
23 something, that means that the whole act is
24 inapplicable to me.

25 I understand that maybe there are other laws

1 out there outside of this uniform act that can control
2 me on that situation. But I think this is extremely
3 overbroad. I think this is the same thing as saying:
4 Notwithstanding any other provision of this act, any
5 person may use controlled substances for medical or
6 scientific use that are necessary for public health and
7 general welfare.

8 I believe that is the proper interpretation.
9 I think this is extremely overbroad. It has not been
10 worked out with the rest of the act. I don't believe
11 you intend what I believe it means.

12 CHAIRMAN LEINENWEBER: Commissioner Tennesen.

13 COMMISSIONER ROBERT J. TENNESSEN (Minnesota):
14 Mr. Chairman, my reaction was a little bit the
15 opposite. The question I pose is: Who would make the
16 determination as to whether it's necessary for public
17 health and general welfare and how would that be made?

18 COMMISSIONER DAVID A. GIBSON (Vermont): We
19 expect that determination would be made on a couple of
20 different levels. Obviously, those charged with
21 enforcement and administration of the act would have to
22 make a preliminary determination. Beyond that, should
23 it ever reach the litigation stage, then, obviously,
24 the court would make the final determination.

25 COMMISSIONER M. MICHAEL CRAMER (Maryland):

1 Why don't you just put in "by medically recognized
2 authorities." You have a licensure provision, then,
3 which would obviate the problem.

4 CHAIRMAN LEINENWEBER: Do you wish to consider
5 that?

6 COMMISSIONER GIBSON: In response to the point
7 made by Commissioner Dykman, while I don't believe the
8 committee agrees that this would have the effect that
9 he contemplates, we recognize that there may be room
10 for disagreement in view.

11 I have not discussed the possibility of
12 adding, after the word "substances," the words
13 "otherwise permitted by the act."

14 If Commissioner Dykman would agree that that
15 might take care of his problem, then we could
16 amend the amendment so it would read that: "This [Act]
17 does not preclude the medical and scientific use of
18 controlled substances otherwise permitted by the [Act]
19 or by this [Act] that are necessary for public health
20 and general welfare."

21 Would that take care of your problem?

22 COMMISSIONER PETER J. DYKMAN (Wisconsin): I
23 will sit down. Thank you.

24 COMMISSIONER GIBSON: Consider that amendment,
25 then, as so amended.

1 CHAIRMAN LEINENWEBER: Commissioner.

2 COMMISSIONER K. KING BURNETT (Maryland): I
3 think Commissioner Dykman is right. You are going to
4 have, even with an amendment in there, you are just
5 leaving probably a jury question, and defense attorneys
6 are going to take this and say: My client is using
7 this for scientific purposes.

8 They are going to want a jury instruction and
9 a jury issue. You have sections, I believe, in here
10 now that allow the use of controlled substances under
11 prescription. You have other provisions in the act.
12 And I think it's going to be very confusing as to why
13 anyone felt it was necessary to put this in. I think
14 you are asking for a lot of trouble.

15 I would urge the body to vote this amendment
16 down. It's a redundancy that's going to create an
17 ambiguity.

18 CHAIRMAN LEINENWEBER: As I understand the
19 wording of the amendment as just amended: "This [Act]
20 does not preclude the medical and scientific use of
21 controlled substances otherwise permitted by the [Act]
22 that are necessary for public health and general
23 welfare."

24 Is that correct?

25 All those in favor, signify by saying "aye."

1 All those opposed.

2 The "noes" appear to have it.

3 Amendment No. 3.

4 COMMISSIONER DAVID A. GIBSON (Vermont):

5 Amendment No. 3 attempts again to deal with Section
6 703, the continuing criminal enterprise provision.

7 Responding to the discussion yesterday, the
8 committee determined to remove subsection (c), which
9 was to define the term "proceeds" and to change the
10 language in terms of the damages to read that in the
11 event that damages were to be obtained, that it would
12 be equal to three times the gross income or the value
13 of resources acquired directly or indirectly by the
14 person who violated Section 411.

15 That is the change that was made to the
16 provision after the action of the conference yesterday.

17 CHAIRMAN LEINENWEBER: Is there discussion on
18 Amendment No. 3? Commissioner Read.

19 COMMISSIONER HAROLD E. READ, JR.

20 (Connecticut): It struck me that -- two things.
21 First, you're dealing with the gross income or the
22 resources.

23 Is there some way we should know which we are
24 dealing with or which is to be selected by the
25 plaintiff in this action?

1 COMMISSIONER GIBSON: We don't believe that
2 the "or" would be restrictive in terms of saying one or
3 the other. It is designed to cover the situation where
4 you may receive either cash in connection with a
5 violation or you may receive other form of payment by
6 way of personal property or real estate by reason of
7 the exchange that violates Section 411. Or you may use
8 some of that cash to put it into the form of some other
9 type of personalty or realty.

10 That's why we have also inserted the words
11 "directly or indirectly" there. While it reads "or,"
12 it's not meant to be restrictive in that regard.

13 Would you be happier with the word "and"?

14 COMMISSIONER READ: I don't know. It just
15 seems to me that if you are saying "or," it ought to be
16 whichever is greater or resources acquired.

17 COMMISSIONER GIBSON: I think the committee
18 would defer to your suggestion.

19 COMMISSIONER READ: My other question is,
20 "resources" seems to me to be kind of a strange choice
21 of words, especially because it appears in Line 17 and
22 Line 21 with what I think are very different meanings.

23 I would think that assets or property or
24 something like that could be used in Line 17. Whatever
25 you think.

1 COMMISSIONER GIBSON: I think the word
2 "assets" would be appropriate. We will make that
3 change.

4 CHAIRMAN LEINENWEBER: Anything further on
5 Amendment No. 3?

6 Seeing no more discussion requested, all those
7 in favor, signify by saying "aye."

8 Opposed.

9 The "ayes" have it. The amendment is adopted.
10 Amendment 4.

11 COMMISSIONER GIBSON: Amendment 4 relates to
12 Section 705. It merely reflects the action of the
13 conference that was approved yesterday. There is no
14 change to what occurred by the conference.

15 CHAIRMAN LEINENWEBER: Seeing no discussion,
16 all those in favor, signify by saying "aye," Amendment
17 No. 4.

18 Opposed.

19 The amendment is adopted.

20 Further amendments.

21 Commissioner Langrock.

22 COMMISSIONER PETER LANGROCK (Vermont): The
23 body has been very patient with me, and I am going to
24 try and be very brief.

25 About 40 possible amendments, I have cut it

1 down to two which I think are rather simple and I think
2 they improve the act.

3 The first I would like to propose is on Page
4 72, and if you go to Line 19 and strike the words "[28]
5 grams or more," and go to Line 20, and between the
6 words "containing" and "heroin," insert "[28] grams or
7 more."

8 There will be other parallel matters, but it
9 is simply a matter of movement.

10 The reason for this is that what we want to
11 measure, when we have a stepped-up penalty based upon
12 the quantity of a drug, we want to deal with the drug.

13 Let me give you an illustration. I can give
14 you 100 of them. Somebody has a gram of cocaine. They
15 come in, they are about to be arrested. They drop the
16 gram of cocaine into a fish bowl. We have a high
17 goldfish and a heavy penalty.

18 What we are talking about here, there is no
19 correlation between the amount of the drug and the
20 amount of what it's mixed with.

21 My own experience in drug prosecutions is that
22 every laboratory report is both quantitative and
23 qualitative, that they can tell you the percentage,
24 that we are not really imposing any real burden upon
25 the prosecution in the great bulk of cases.

1 The idea that we go before the American Bar
2 Association or go before the state legislature and say
3 that by dropping a gram of cocaine in a goldfish bowl
4 or in a toilet bowl or even into the whole sewer system
5 of the county, that we are changing the potential
6 punishment many fold, I think makes us look rather
7 ridiculous. I don't think there is any benefit in
8 keeping it this way, and I would urge the amendment.

9 CHAIRMAN LEINENWEBER: Commissioner Pixler for
10 the committee.

11 COMMISSIONER REID C. PIXLER (Colorado): I
12 would like to put this in perspective. What we are
13 talking about is the same subject that's been debated
14 before this body before. What we are talking about is
15 the purity of the substance. Does the purity of the
16 material change the penalty?

17 Basically if you are dealing with a hundred
18 percent pure cocaine or if you are dealing with a
19 kilogram that is represented to be 100 percent pure
20 cocaine, it's ten percent pure cocaine, is there a
21 distinction?

22 Within the act, there are a number of factors
23 that are involved. The quantity of the material that's
24 provided sets up a standard. Within that penalty
25 range, then, there is room for discretion to the court

1 to sentence, depending upon the relative purity, if
2 that's a factor that's important.

3 The pyramid operation of distribution works
4 very simply. The purest cocaine is introduced into the
5 country. The reason is because they have expensive
6 transportation costs.

7 There is a theory that the purest cocaine
8 indicates you're the close to the source to the
9 introduction into the country. That's true. And it is
10 typically very high quality, very pure cocaine.

11 Then there is a distribution system in which
12 it's stepped on or it's diluted and distributed out so
13 that it can reach a much broader level of people.

14 When you find people with a very high volume,
15 a very low purity of a substance like cocaine, you are
16 dealing with the street distribution network. The
17 question is, do we punish those people severely? The
18 answer, through the federal court system, has been
19 "yes." Because those are the folks that are doing the
20 actual distribution to the street-level people that are
21 selling it to the individuals, to the kids.

22 Now, we can go through any number of horror
23 stories about cocaine in a fish bowl. My first thought
24 when I heard that was, there is probably also a cruelty
25 to animals charge. But is somebody going to bring

1 that?

2 We can't eliminate all of those potential
3 problems. But will they really arise? What's the
4 percentage or likelihood that somebody is going to be
5 charged for a fish bowl of cocaine?

6 If we cut the net to be concerned about those
7 kinds of situations, we will let the street dealers,
8 the people that are distributing the volume of
9 lower-level purity -- an incredible break.

10 The additional impact on the crime labs that
11 have to do the analysis -- yes, they have got to
12 determine what it is. Is it cocaine? Does it react to
13 the scientific tests? But when you begin to deal with
14 a truck load of cocaine or even a kilo of cocaine, how
15 do you determine the purity of all of it? Do you do
16 random samples? Do you have to test all of the cocaine
17 to determine this? Does this then become an issue that
18 the jury has to make a special finding upon, because we
19 have competing chemists?

20 What I'm suggesting to you is that the
21 potential of problems by departing from the gross
22 weight procedures that are used by a majority of the
23 states, that I'm not aware of -- I am not aware of any
24 state in the country -- there may be -- but there is
25 not a state that I know of that uses the pure weight

1 standard, because it creates terrible problems.
2 Wisconsin, I believe, had a pure weight, and they had
3 to go back to the gross weight approach.

4 What you do, if you change this, is materially
5 impact in a negative respect the ability to enforce the
6 drug cases, particularly in situations of a trial.

7 I think Mr. Harbin had some comments on the
8 effect in the federal system.

9 MR. HARRY HARBIN: Peter, you have done
10 defense work in federal court, so I am sure you are
11 aware of how federal drug sampling works when a large
12 quantity of drugs has been seized. Your chemist
13 typically takes a random sample out of the drug, a
14 certain number of random samples, places it under a
15 hood, so that the DEA report that you get through your
16 criminal discovery does indeed have a net weight
17 percentage and a gross weight percentage.

18 But you also know that, because, out of many,
19 many kilograms of cocaine, that percentage is based on
20 a mere random sampling, it opens up a jury issue. In
21 many cases, our labs are already overwhelmed with work.
22 And the gross amount is far more preferable than
23 anything that would impose a purity standard.

24 It also reflects the marketplace. Drugs are
25 commonly dealt at the street level after they have been

1 cut or -- with mediums -- that the defendant or the
2 dealer, the trafficker, controls the weight of the
3 drugs that he has. It very much reflects the realities
4 of the drug market to use a gross weight, including the
5 cut, the medium, and that sort of thing.

6 The courts, as you know in the federal system,
7 have upheld this persistently, and the cases are in 107
8 of the blue book. The Ninth Circuit said Congress
9 clearly intended to base mandatory minimum sentences on
10 quantity. Congress's objective is rationally related
11 to the means chosen. Large volume dealers, regardless
12 of the purity of narcotic, pose substantial danger to
13 society.

14 I think to put a purity standard in here would
15 disserve the public interest and would make drug
16 prosecutions far more difficult.

17 CHAIRMAN LEINENWEBER: Commissioner on my mid
18 right.

19 COMMISSIONER SHAUN P. HAAS (Wisconsin): I
20 rise to support the motion. I'm not going to debate
21 the issue of minimum penalties again, but I think the
22 combination of the mixture and the minimum penalties,
23 should states select that bracket, results in the kinds
24 of outrageous decisions that judges will have to be
25 forced to hand down because these higher penalties will

1 kick in with a diluted mixture of substance. I do
2 think there will be the case of the cocaine in the fish
3 bowl or in the toilet tank and an abusive prosecutor.

4 I think we are sending out a very sloppy
5 product. I think we are encouraging the drug war to be
6 limited to the poorer areas of our urban cities. We
7 are sort of going light on the big traffickers. We
8 want a big volume of busts, a big volume prosecution, a
9 lot of headlines, a lot of stories, but I don't think
10 it's going to solve the problem.

11 I think this is just a good example of the
12 major flaw in this act. I think, clearly, the offense
13 should be based on the purity of the substance, because
14 when you are talking about pure cocaine versus a
15 heavily diluted product, you are distinguishing between
16 a major offender and a minor offender.

17 CHAIRMAN LEINENWEBER: Commissioner on my far
18 right.

19 COMMISSIONER BRUCE E. MUNSON (Wisconsin): I
20 rise to oppose the motion. I feel that the burden of
21 proof of proving that the person knowingly possessed
22 heroin or cocaine is a proper -- and, of course, a
23 difficult one in certain cases.

24 If the defendant comes back and says, "I have
25 always gotten my heroin at 50 percent purity, and this

1 was 60 percent purity, I had no reason to suspect
2 that," I feel that this -- to take into account the
3 relative purity of the various drug amounts would cause
4 great difficulties in the burden of proof and the
5 knowingly possessing it. I think it's something that's
6 legitimate to punish someone who has a large quantity
7 of a diluted substance along the same lines of
8 reasoning that we do punish people who deliver the
9 decoy drugs, the fake drugs.

10 CHAIRMAN LEINENWEBER: Commissioner Meilke and
11 then Commissioner Langrock to close. Commissioner
12 Meilke.

13 COMMISSIONER DONALD E. MIELKE (Colorado): I
14 would urge the commissioners to vote a strong "no" vote
15 on this motion. This attacks the whole concept. If we
16 move this area, I imagine Peter will have another
17 motion moving it in LSD, moving it in crack, moving it
18 in cocaine. And having moved that section around the
19 mixture and substance, we will be changing the law in
20 most if not all of your states. I don't know if a
21 purity state out there. The federal standard is a
22 mixture of substance standard. We would be changing
23 the law totally in all the states. I think that's bad
24 public policy.

25 What we are seeing is a -- real life out there

1 is much stronger-type drugs. We are seeing the tar
2 heroin now, the black tar heroin, a lot in Colorado.
3 To change this here, in saying that person, because he
4 is doing a much stronger drug, and it's being dropped a
5 little bit in purity and being cut some, should have a
6 deal or have a lesser penalty, I think that is bad
7 public policy.

8 I would urge the commissioners to defeat this
9 motion.

10 CHAIRMAN LEINENWEBER: Commissioner Langrock,
11 to close.

12 COMMISSIONER PETER F. LANGROCK (Vermont): My
13 motion does go to all of the sections. I just use that
14 illustratively.

15 I would like to respond to the federal
16 adviser. I never had a case with kilos of cocaine. I
17 have had cases with five grams of cocaine prosecuted in
18 the federal courts.

19 The resources that the federal government has
20 used in those cases is sufficient that I'm not really
21 concerned about putting resources of a laboratory
22 running five samples quantitatively on a truckload of
23 cocaine.

24 What we are dealing here with -- remember,
25 this whole act is a tremendously powerful tool for

1 prosecution. There is a great lack of sensitivity to
2 the minor person at the bottom of the pile.

3 You remember that a person handing a joint to
4 another person is distributing and is treated the same
5 as a dealer. We are talking about a very powerful
6 tool.

7 It seems to me that there are two questions.
8 It's illogical to give a greater penalty because
9 somebody puts more water into a substance or more sugar
10 in a substance. We are trying to deal with the
11 substance itself. I think that is illogical.

12 We say that the drug prosecutors need this
13 because otherwise there will be tar heroin on the
14 streets. We have so many tools here. But I'm not
15 worried about somebody getting away with something
16 because you can't prove tar heroin or the quantity of
17 it. I think you can.

18 What I am worried about is the untoward and
19 the unreasonable results that are occasioned by looking
20 at the total quantity of a diluted substance rather
21 than the quantity of the substance itself.

22 Scientifically it can be done. Every report
23 says it. It wouldn't take another 30 seconds in any
24 prosecution I have ever seen to prove it. It at least
25 puts the matter into a balance of what we are really

1 trying to get at, and I urge the acceptance of the
2 motion.

3 CHAIRMAN LEINENWEBER: Commissioner Langrock,
4 so I understand, get your motion correctly, you used
5 the proposed amendment on Page 72 as an example. You
6 wish that applied -- in effect, what we are voting on
7 is to go from a gross weight to a net weight statement
8 of the crime.

9 All those in favor, signify by saying "aye."

10 All those opposed.

11 The "noes" have it. The motion fails.

12 Commissioner Langrock, for further amendments.

13 COMMISSIONER LANGROCK: I think I got a
14 winner. You always say that when you are optimistic.

15 Page 87. Page 87. On Line 23, I move to
16 strike the word "encourage."

17 Let's assume that this is enacted in this
18 jurisdiction and I look at my good friend Paul Wilbert
19 from Kansas and I said, "Paul, I would like to
20 encourage you to smoke a joint." Have I at that point
21 committed a crime? If I write a book calling for the
22 repeal of all narcotics laws, have I not committed a
23 crime?

24 It seems to me that what we have here, we have
25 traditional words of "solicit," "induce" -- and this

1 word "encourage" runs, if it applies to speech, right
2 in confrontation with the First Amendment.

3 CHAIRMAN LEINENWEBER: The committee has
4 accepted your amendment.

5 COMMISSIONER LANGROCK: That is the easiest
6 one I have had.

7 [Loud and sustained applause]

8 CHAIRMAN LEINENWEBER: Commissioner Baggett
9 for further amendments.

10 COMMISSIONER BRYCE A. BAGGETT (Oklahoma): Mr.
11 Chairman, yesterday I raised with the committee a
12 question about the placement of the words "knowingly
13 and intentionally." I would like to offer an amendment
14 to Section 402 on Page 80. This deals with subsection
15 (c).

16 I believe I understand the intention of the
17 committee, but I think that the words used and the
18 placement of the words fails to reach the intention. I
19 would like to propose this amendment. I move to amend
20 the committee's draft of the Uniform Controlled
21 Substances Act on Page 80 in Lines 20 and 21 by
22 striking "knowingly and intentionally" and in Line 25
23 by striking the word "is" and substituting therefor the
24 words "and intends to be."

25 There is a second amendment to correspond to

1 that on Page 81. I would like to state it as a single
2 motion. On Page 81 in Line 7, by striking the words
3 "knowingly and intentionally" and in Line 8 by
4 inserting, after the word "place" and before the word
5 "purpose," the words "with the knowledge and intention
6 that it will be used."

7 Likewise, in Line 12 by striking "knowingly
8 and intentionally" and by inserting in Line 14, after
9 the word "enclosure" and before the words "for the
10 purpose," the words, quote, "with the knowledge and
11 intention that it will be used."

12 If I may, for the benefit of the other
13 commissioners, I would like to read that in context as
14 to how each of these provisions would read after those
15 amendments.

16 On Page 80, subsection (c) would read: "It is
17 unlawful for any person to keep, maintain, control,
18 rent, lease, or make available for use any store, shop,
19 warehouse, dwelling, building, vehicle, vessel,
20 aircraft, room, or enclosure, or other structure or
21 place, which that person knows and intends to be
22 resorted to for the purpose of keeping for
23 distribution, transporting for distribution, or
24 distributing controlled substances in violation of this
25 [Act]."

1 Likewise, subsection (d) would read as
2 follows: "Except as authorized by this [Act], it is
3 unlawful:

4 "(1) to open or maintain any place with the
5 knowledge and intention that it will be used for the
6 purpose of unlawfully manufacturing a controlled
7 substance; or

8 "(2) to manage or control any building, room,
9 or enclosure, either as an owner, lessee, agent,
10 employee, or mortgagee, and rent, lease, or make
11 available for use, with or without compensation, the
12 building, room, or enclosure with the knowledge and
13 intention that it will be used for the purpose of
14 unlawfully manufacturing a controlled substance."

15 I suspect that this is what the committee
16 intends. But by placing the words, the modifying words
17 "knowingly and intentionally" before the verbs "to
18 rent, lease, let, or maintain," rather than before the
19 words implying the criminal conduct -- I always
20 intentionally rent a building. I never do it
21 accidentally. I always intentionally and knowingly
22 rent it.

23 What I don't intend is that some guy is going
24 to come in there and make junk. That's the intent we
25 want to punish, not my intent to be a profitable

1 landlord.

2 I think it's the sense of what the committee
3 is really trying to do -- it's the misplacement of the
4 modifying words that gives us the wrong effect. What
5 the committee's language allows is someone else's
6 intent to determine whether the accused is guilty.
7 Because it would be the intent of a person who, without
8 my intention, misuses my building that will get me in
9 trouble.

10 Let me give an anecdotal example. If a mother
11 of a 14-year-old boy maintains and permits him to live
12 in her home and he smokes marijuana in it, her
13 intention to maintain a home -- she knowingly and
14 intentionally does that. She doesn't knowingly and
15 intentionally have him smoking the marijuana. That's
16 his intent, not hers. But she is guilty of a crime
17 under the way you phrased it -- if he had the intent
18 and she had the intent to maintain the home.

19 CHAIRMAN LEINENWEBER: Commissioner Pixler for
20 the committee.

21 COMMISSIONER REID C. PIXLER (Colorado):
22 First, this language has been drafted with a great deal
23 of assistance from the conference as the whole. I
24 think the question I want to first try to specify is
25 that this is designed to break the crack houses. It's

1 designed to focus upon the landlord who knowingly and
2 intentionally rents a property and knows that that
3 property will be used as a crack house.

4 The difference, the amendment will change the
5 standard from proving that he rented the property to
6 these people knowing that it will be used for a meth
7 lab or for a crack house -- by the effect of the
8 amendment, it will cause the burden of proof to be that
9 the landlord intended for that operation to be held
10 there.

11 What this is designed to do is to focus
12 against the willful blindness of people that know that
13 the property was being used as a crack house
14 originally. It started out as a forfeiture provision,
15 I believe, in Washington, and has gone through various
16 changes, and this is the last change the conference
17 made in Hawaii. The intention was to stop willful
18 blindness of people saying: Gee, I didn't know. I
19 didn't intend for that property to be used in that
20 fashion.

21 It's a significant change, and I would urge a
22 "no" vote because I believe this clearly sets what we
23 are trying to accomplish, that someone cannot possibly
24 simply be willfully blind to the application that the
25 property has been made use of by his tenants, and not

1 have some consequence to engage in the passive
2 blindness.

3 COMMISSIONER BAGGETT: May I ask a question of
4 that explanation. If you mean that to apply only to
5 actual positive knowledge, I don't think I would object
6 too much.

7 In my state, the word "knows" includes that
8 which you should know if you are aware of facts which
9 would put a prudent man under duty to make diligent
10 inquiry.

11 In your use of the word "knows" here, do you
12 intend it really to mean, then, in that context, "knows
13 or should have known"?

14 CHAIRMAN LEINENWEBER: Commissioner Pixler.

15 COMMISSIONER PIXLER: I believe that it is the
16 facts -- for example, the things we have discussed.
17 Would someone know that the property is being used as a
18 crack house if there had been six search warrants
19 served on that property and the same people are in that
20 property using it as a crack house?

21 After having discovered that kind of
22 information and that these same tenants then are
23 located in another of the landlord's properties, does
24 he know that that person -- does he have actual
25 knowledge that that tenant in another property is going

1 to use that property as a crack house?

2 Or, if he does a reasonably prudent inspection
3 of his building and he sees steel doors and little gun
4 slits and pulley systems to lower the crack down to the
5 street, does he know or do those facts reasonably
6 establish that he should know?

7 I think the burden is that he knows or that --
8 the facts are that he reasonably should know. I think
9 that's the way it's drafted.

10 COMMISSIONER BAGGETT: I think that six search
11 warrants, I wouldn't disagree with you. Do you include
12 a duty of a landlord to periodically inspect the
13 premises to determine? That's not stated. Is that an
14 assumption on your part?

15 COMMISSIONER PIXLER: No.

16 CHAIRMAN LEINENWEBER: Commissioner Daykin.

17 COMMISSIONER FRANK W. DAYKIN (Nevada): With
18 the Chair's permission, I would like to put a question
19 to Commissioner Baggett.

20 CHAIRMAN LEINENWEBER: You may.

21 COMMISSIONER DAYKIN: I would use Page 80,
22 Lines 20 and 21, as my example. The text reads
23 "knowingly 'or' intentionally." As I heard the
24 commissioner's oral motion, when he moved the words, he
25 made them "knowingly 'and' intentionally."

1 Was the change from "or" to "and" deliberate
2 or accidental?

3 CHAIRMAN BAGGETT: Deliberate.

4 CHAIRMAN LEINENWEBER: You received your
5 answer to your question.

6 Mr. Harbin.

7 MR. HARRY HARBIN: Commissioner Baggett, I
8 believe that the language as it is in the committee
9 draft is accurate. You're correct that when you rent
10 or lease a property, you intend to do it. You are out
11 there in commerce and you intend to have that lease.

12 However, there are many properties in our
13 urban areas that are vacant, that aren't intended to be
14 leased to anyone, but through no intent on the part of
15 the owner are overtaken by drug gangs and used as crack
16 houses and distribution points. They are otherwise
17 vacant properties.

18 What this statute as presently drafted
19 requires is that the landlord or owner of the building
20 know and intend to lease, rent, maintain or make it
21 available to someone, also knowing that it will be used
22 for drugs. It's a double scienter requirement, and I
23 believe it serves a useful purpose, and your amendment
24 would be in conflict with that.

25 CHAIRMAN LEINENWEBER: We are either going to

1 have to take a vote on this amendment now or put it off
2 until a later time.

3 COMMISSIONER DONALD JOE WILLIS (Oregon): Can
4 I have permission to ask a question of the Drafting
5 Committee on this before we have to vote?

6 CHAIRMAN LEINENWEBER: As I understand it, you
7 can ask the question when we reconvene. Is that
8 correct, Mr. President?

9 Ask your question quickly.

10 COMMISSIONER DONALD JOE WILLIS (Oregon): I'm
11 looking at subsection (c). I have heard the debate so
12 far. But it looks to me like in subsection (c), if I
13 own a rental house and I'm not in the business of
14 renting to drug dealers for distribution, but find out
15 it's occurring in my rental house, call the police to
16 inform them, I probably have just admitted every fact
17 that needs to be proven to prosecute me. Because I'm
18 still maintaining the house. I now know that they are
19 distributing from my rental house. I just called the
20 police to complain, get their help. I think I have
21 just admitted to a very serious felony. It looks to me
22 like everything would be complete that you would need
23 to prosecute me. Now, you may or may not choose to do
24 that, but I would be very uncomfortable if I knew that
25 was a completed crime. As I read that, I think that it

1 is.

2 COMMISSIONER REID C. PIXLER (Colorado): The
3 defense is in paragraph (e).

4 COMMISSIONER WILLIS: What happens if the
5 police department is too busy? What do I do? I have
6 to go F-E-D some drug dealers? Your language in (c)
7 just doesn't match up with what you have got down there
8 in (d). I really don't understand the difference or
9 the difficulty in making those two sections balance.

10 COMMISSIONER THOMAS A. BOLT (U.S. Virgin
11 Islands): Mr. Chairman, I call for the orders of the
12 day.

13 CHAIRMAN LEINENWEBER: Excuse me, sir?

14 [Laughter]

15 CHAIRMAN LEINENWEBER: We don't know who you
16 are and what you want.

17 [Laughter]

18 COMMISSIONER BOLT: Commissioner Bolt from the
19 Virgin Islands. I believe we have a special order
20 pending. I call for the orders of the day.

21 CHAIRMAN LEINENWEBER: Mr. President, the
22 Committee of the Whole rises and reports that it has
23 had under consideration the Uniform Controlled
24 Substances Act, has made progress and asks leave to sit
25 again.

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1 EIGHTH SESSION (Resumed)

2 UNIFORM CONTROLLED SUBSTANCES ACT

3 TUESDAY, JULY 17, 1990

4 Mr. Harry D. Leinenweber of Illinois, presiding.

5 CHAIRMAN LEINENWEBER: When we adjourned, we
6 were considering Commissioner Baggett's amendment to
7 Section 402, and I believe Commissioner Mielke had
8 arisen to speak. Commissioner Meilke, you may address
9 the motion.

10 COMMISSIONER DONALD E. MIELKE (Colorado):
11 Thank you, Mr. Chairman. Just to point out for the
12 commissioners the inconsistency of the motion. Just
13 technically, I would urge a "no" vote.

14 CHAIRMAN LEINENWEBER: Could we have a little
15 attention. Commissioner Mielke.

16 COMMISSIONER MIELKE: Thank you. In a
17 technical sense, when you go through Section 4 and all
18 of the areas, the criminal section, the "knowingly or
19 intentionally" standard as set forth, it says a
20 person -- it is unlawful for any person to do
21 unlawfully, knowingly or intentionally something. We
22 go through that section. So, if you are going to make
23 this change here, it's going to be totally inconsistent
24 technically with all of the other areas of the draft.

25 I do not agree with the maker of the motion as

1 to why he wants to do it. But from a technical
2 standpoint, the section would need to be totally
3 redrafted to make it consistent.

4 CHAIRMAN LEINENWEBER: Commissioner Baggett,
5 you may close on your motion, sir.

6 COMMISSIONER BRYCE A. BAGGETT (Oklahoma): May
7 I first pose a question for the last explanation that
8 preceded our adjournment for the music.

9 Immediately before we adjourned, one of the
10 members of the committee was explaining the intention
11 of the section as drafted by the committee. I want to
12 be sure I understood it. That the owner of a vacant
13 building would be guilty of a crime if somebody moves
14 in and shoots dope in it or smokes dope in it -- if he
15 doesn't inspect it and prevent that, he is knowingly
16 and intentionally maintaining the building. He doesn't
17 know or intend that some vagrant will move in it and
18 smoke dope. But he would be guilty of a crime, the way
19 it reads, because he knows that vagrants do things like
20 that, even without an intention that they do it -- was
21 that the answer that you were giving me?

22 COMMISSIONER DAVID A. GIBSON (Vermont): That
23 is not the answer that the committee would give to that
24 situation. This is a specific intent provision, and
25 you have the intent to violate the law by the

1 activities that you undertake as shown there.

2 Once you acquire actual knowledge, then you
3 are under a duty to report it to the police so that
4 steps can be taken to eliminate the illegal use of
5 those premises.

6 COMMISSIONER BAGGETT: Mr. Gibson, with
7 respect to that, is it sufficient on Page 80, Line 25,
8 that I know that these bums keep breaking into my
9 building and smoking dope in it. I know that because I
10 found evidence of it 50 times when I visited the place.
11 I put boards over it and I have called the cops. They
12 still do it, and I still know it.

13 Haven't I violated this section if they do it
14 again, if I maintain the place?

15 COMMISSIONER GIBSON: If you have notified the
16 police, then that insulates you from any possible
17 charge.

18 Commissioner Baggett, also the committee
19 believes that the language that is presently in
20 subsection (c) accomplishes what you are seeking to
21 accomplish and accomplishes it better. We do think
22 that as far as subsection (d)(2) on Page 81, that we
23 would add the words, after the word "enclosure," that
24 appear also on Page 80, and those words would be "which
25 that person knows is resorted to for the purpose of

1 unlawfully manufacturing a controlled substance."

2 We would agree with your point in that
3 respect.

4 COMMISSIONER BAGGETT: Would that also fit in
5 Line 8 as well as in Line 14, "maintain any place" --
6 who knows that it will be used for the purpose of?

7 COMMISSIONER GIBSON: We don't see it as being
8 necessary there, but out of an abundance of caution, we
9 would have no problem in doing that.

10 COMMISSIONER BAGGETT: I would appreciate
11 that. It is not my purpose in this one to trouble the
12 committee on this point. I just want to be sure I
13 understand what the scienter is that we are punishing,
14 and if -- I won't argue. I will submit the motion.

15 CHAIRMAN LEINENWEBER: Did the committee's
16 corrections satisfy you, Commissioner Baggett, or do
17 you wish to pursue your motion?

18 COMMISSIONER BAGGETT: I will withdraw the
19 motion, with the understanding that that reporting to
20 the police for the guy with a vacant building is
21 enough. I'm still worried about the lady who has the
22 14-year-old kid smoking pot in the house that she can't
23 control.

24 CHAIRMAN LEINENWEBER: So, the motion is
25 withdrawn.

1 COMMISSIONER BAGGETT: No. I want to leave it
2 for this reason. You are requiring her to report her
3 child to the police as the only out that she has got --
4 to being a felon. I want to leave it in for her.

5 CHAIRMAN LEINENWEBER: Commissioner Baggett,
6 I'm not sure, as the chairman, what exactly of your
7 motion is left.

8 COMMISSIONER BAGGETT: The second portion of
9 my motion went to subsection (d). I am satisfied with
10 the two committee amendments to subsection (d). The
11 only thing remaining is the amendment to subsection (c)
12 on Line 25. That's where I'm concerned about the
13 mother who can't control her child, and it's his
14 intention, rather than hers, the way it's now written.
15 Or she has to turn him into the police.

16 CHAIRMAN LEINENWEBER: On the new motion,
17 Commissioner Burnett.

18 COMMISSIONER BAGGETT: I would like to close
19 on that.

20 COMMISSIONER K. KING BURNETT (Maryland): This
21 section, after reading it, now that we have got it up
22 here before us again, is very troubling. Because any
23 apartment complex, the landlord is going to know that
24 something is taking place in it and he is going to get
25 evidence of that from time to time, and he probably

1 can't evict people for it.

2 This business about notifying a law
3 enforcement agency of the illegal conduct. I don't
4 know that it would be read in a court the way the
5 committee is reading it. You notify them once. If I
6 own an apartment complex of any size, I would notify
7 the police that I believe there is illegal conduct
8 taking place in my building every week -- or how often?
9 Is one time enough for that year? Is one time enough
10 for that week.

11 It would be a separate crime, it would seem to
12 me, under this statute, under this provision, each time
13 that you know that something takes place. In other
14 words, it's a separate act each time. It would seem to
15 me logical that you would have to notify them each
16 time.

17 Do you notify them after the police have come
18 and investigated? When do you notify them? Do you
19 notify them before the conviction, notify them before
20 the police investigate? How specific do you have to
21 notify them?

22 I just don't understand why we have got this
23 in here.

24 CHAIRMAN LEINENWEBER: Commissioner Gibson.

25 COMMISSIONER DAVID A. GIBSON (Vermont): This

1 language and this concept appears in the uniform act
2 presently.

3 What we have done as a committee -- two
4 things. One is to expand the possible actions of a
5 person in control of a building that would be brought
6 under the sweep of it, such as control, rent, lease, or
7 make available for use -- various things. But in the
8 process also we have tightened it up by adding the
9 words, "which that person knows is resorted to."
10 Previously it read, "which is resorted to by persons."
11 We have tightened it up in that respect.

12 Also we have limited the types of offenses
13 that it relates to by requiring that it be for the
14 purpose of keeping for distribution, transporting for
15 distribution, or distributing controlled substances in
16 violation of this act.

17 For those reasons, the parent whose son or
18 daughter may smoke a joint in their room and is later
19 discovered by the parent, that's not a distribution or
20 a transporting for distribution or otherwise brought
21 under this act. We have tightened it up. We think we
22 have improved the existing language. And that's the
23 purpose of having this in there.

24 CHAIRMAN LEINENWEBER: Commissioner Langrock.

25 COMMISSIONER PETER F. LANGROCK (Vermont):

1 However, if that the son had the joint in his room and
2 passed it to his buddy, then it would be distribution
3 and would fall within this, would it not?

4 CHAIRMAN LEINENWEBER: Are you looking for an
5 answer?

6 COMMISSIONER LANGROCK: Yes. I think it's
7 somewhat disingenuous to simply say that there aren't
8 any definitional problems on the type of crimes. You
9 are coming a lot better. But it seems to me that
10 because your distribution so broad, that you still have
11 lots of potential here for some very, very minor
12 offenses being brought into this.

13 COMMISSIONER GIBSON: There is a technical
14 distribution there. If you want to hang up the act on
15 that, of a situation because of it, fine. I just don't
16 think that it's realistic to think that the parent is
17 necessarily going to know that that is the purpose that
18 Johnny brings his friend Ralph over and they go into
19 the room on that type of situation.

20 You have got to show that the person knows --
21 the person who is in control of the place -- that the
22 person knows that it is being resorted to for that
23 particular purpose. I just don't think it fits neatly
24 in the hypothesized situation that you have put.

25 COMMISSIONER LANGROCK: If I may just briefly

1 respond. I am sympathetic with what you are getting
2 at. The real problem here is not in this section so
3 much as it is in your rather broad distribution
4 concept.

5 To suggest that this is not used -- I can give
6 chapter and verse of where possession with intent to
7 distribute of very small quantities can be brought out.
8 There is the potential for abuse here in some very,
9 very minor activities by people within the house. But
10 it is better than it was.

11 CHAIRMAN LEINENWEBER: Commissioner on my
12 right.

13 COMMISSIONER LLOYD S. KURTZ, JR. (Alaska): I
14 would like to go in a different direction for a moment
15 on this. I consider myself very practical, and I have
16 had very little criminal law experience. I represent
17 mostly banks and government, public corporations and
18 other members of the establishment.

19 I'm curious whether the committee has given
20 any thought to the impact of these sections that, in
21 effect, require notifying the authorities or filing
22 unlawful detainer actions or eviction actions, or both,
23 upon the corporations, both public and private, that
24 increasingly own, as the savings and loan crisis goes
25 on, and as the State of Alaska and federal government

1 keep making bad real property loans, the real property
2 in which much of your cocaine distribution occurs.

3 One of the impacts of this is going to be
4 putting those public corporations and private ones in
5 the same difficult position that we have talked about
6 for mothers of 14-year-olds.

7 I'm curious whether the committee has
8 considered that, and, more particularly, whether it's
9 considered any kind of a protective measure to exempt
10 or at least relieve these corporations of the duty of
11 repeatedly filing unlawful detainer actions. The
12 classic example is a typical Chicago public housing
13 project.

14 CHAIRMAN LEINENWEBER: Does anybody wish to
15 respond?

16 COMMISSIONER DAVID A. GIBSON (Vermont): The
17 committee deliberately did not include a provision of
18 "reason to know" in this particular section. It says
19 that that person knows. Now, if the knowledge exists,
20 then we want whoever it is in control of that property
21 to notify the police or take other steps that will keep
22 it from being so used.

23 COMMISSIONER KURTZ: I submit that the
24 practical effect of this would be to require the
25 Chicago public housing corporations in some cases to

1 file eviction notices against half of their tenants.

2 CHAIRMAN LEINENWEBER: The commissioner on my
3 left.

4 COMMISSIONER WILLIAM H. NAST, JR.

5 (Pennsylvania): I think the problem with (c) is -- the
6 answer to the problem of (c) is suggested by
7 Commissioner Gibson when he paraphrased that clause.
8 He said the person knows it's used for the purpose of.

9 The language that troubles me is "resorted
10 to." Because obviously that means something more than
11 knowing that the activity is going on. I think that
12 solves the problem.

13 If you do all these things -- control, rent,
14 lease -- for the purpose of distributing, transporting,
15 et cetera, it sounds to me like criminal behavior. But
16 to say that somebody knows something is being resorted
17 to makes it a different level, and I think that's the
18 problem that troubles me with this clause.

19 I suggest that that be changed to delete the
20 language "as resorted to for the purpose of" and
21 substitute the typical criminal language that says you
22 know it's for the purpose of a criminal act.

23 I put that in the form of a motion.

24 CHAIRMAN LEINENWEBER: You're seeking to amend
25 the motion on the floor by deleting the changes that --

1 COMMISSIONER NAST: I'm not aware of what the
2 motion on the floor is. What is that?

3 CHAIRMAN LEINENWEBER: Well, the motion on the
4 floor is, on paragraph (c), Line 20, delete "knowingly
5 or intentionally," and on Line 25, after "knows,"
6 strike "is" and "intends to be resorted to."

7 COMMISSIONER NAST: Maybe that's the same
8 motion, in which case I'm supporting it.

9 CHAIRMAN LEINENWEBER: What word did you
10 suggest in lieu of "resorted to"?

11 COMMISSIONER NAST: Beginning on Line 25,
12 "which that person knows" -- no. "For the purpose of
13 distribution, transporting," going on Page 81, second
14 line.

15 In other words, that it's for the purpose of
16 doing these things. He rents, controls, polices, makes
17 available for use -- for the purpose of doing those
18 things.

19 CHAIRMAN LEINENWEBER: Knows is for the
20 purpose of.

21 COMMISSIONER BRYCE A. BAGGETT (Oklahoma): For
22 clarification, please. What you want to do is strike
23 all of Line 25, put in that somebody has knowingly and
24 intentionally kept, all for the purpose of.

25 I would be quite happy with that amendment.

1 COMMISSIONER NAST: Yes.

2 CHAIRMAN LEINENWEBER: The proposed amendment
3 which Commissioner Baggett would accept is to strike
4 Line 25 and leave "knowingly" -- so it would read: "It
5 is unlawful for any person knowingly or intentionally
6 to keep, maintain, control, rent, lease, or make
7 available for use, any storage, shop, warehouse,
8 dwelling, building, vehicle, vessel, aircraft, room,
9 enclosure, other structure or place, for the purpose of
10 keeping for distribution, transporting," et cetera.

11 COMMISSIONER NAST: That does comply with what
12 I suggested.

13 CHAIRMAN LEINENWEBER: You accept that?

14 COMMISSIONER BAGGETT: Yes, sir.

15 CHAIRMAN LEINENWEBER: Is that a conditional
16 acceptance?

17 COMMISSIONER BAGGETT: Unconditional. I will
18 vote for it.

19 CHAIRMAN LEINENWEBER: That is now the motion.
20 What is the committee's position on that? The
21 committee does not accept that. We do have an amended
22 motion.

23 Further discussion on the motion.
24 Commissioner.

25 COMMISSIONER H. LANE KNEEDLER (Virginia): If

1 I understand what the new motion is on the floor now, I
2 would urge the Committee of the Whole to defeat the
3 motion. As I understand it, on Line 25, all of what's
4 there now would be replaced with -- just deleted, just
5 being used for the purpose of, is that correct?

6 CHAIRMAN LEINENWEBER: That's as I understand
7 the motion.

8 COMMISSIONER NEEDLER: All right. Let me
9 speak to that, then. If that's the motion, this isn't
10 necessary. A person who does all this "for the purpose
11 of" is guilty of the substantive offenses, as I
12 understand it.

13 Let me speak to what the committee originally
14 had or has still in the bill, the intentionally or
15 knowingly keeping, maintaining -- I agree that you
16 probably don't need "knowingly or intentionally," but
17 it doesn't hurt.

18 The crux of it is on line 55, adding "knows or
19 intends," or the new language, "for the purpose of."
20 What the committee had was a subjective standard for
21 knowledge. This is not "has reason to know" or
22 "reasonably should know." It's not a negligence
23 standard.

24 It's true that you can use circumstantial
25 evidence to prove knowledge, but the finder of fact is

1 going to have to say that the defendant in fact knew,
2 subjectively knew in his or her mind, that the
3 structure was being used for that purpose.

4 If you add intention, ask yourself under these
5 circumstances how you would ever prove that a landlord
6 in these circumstances who knows that the particular
7 conduct is going on that can honestly say, "Wasn't my
8 intention," is ever going to be convicted.

9 I suggest to you, with "intention" here, it is
10 either a meaningless provision, if what you are trying
11 to do is get, in effect, aiding and abetting conduct,
12 or you don't need it because the person is guilty of
13 the substantive offense.

14 What this particular provision is, is a
15 specific aiding and abetting statute. Let me give you
16 a down-home example from where I live now in Virginia.
17 Let's suppose you have a country store owner who is
18 selling sugar to an individual that he knows has a
19 still, and he sells him large quantities of sugar, once
20 a week. He knows what that sugar is being used for, to
21 make moonshine.

22 Does he intend that the person make moonshine?
23 No. He can honestly say: I don't care what he uses it
24 for. I'm merely selling sugar.

25 Most states in this set of circumstances --

1 and this is a specific aiding and abetting statute --
2 have said knowledge under those circumstances is
3 enough.

4 I suggest to you that's what we ought to say
5 here. I urge that the motion be defeated.

6 COMMISSIONER DONALD JOE WILLIS (Oregon): I
7 rise to support the motion. I would point out to the
8 conference that with this language in subsection (c)
9 now, the bill will treat the distribution sections and
10 the manufacture sections, I think, in a like manner.

11 If you look down at subsection (d), where you
12 deal with manufacture, you have to maintain these
13 things for the purpose of allowing the manufacture. I
14 don't see any harm whatsoever in doing this.

15 The way you had it set up without that
16 amendment, you have technical violations of that
17 provision. You don't have any time lines in there for
18 the defensive contacting the police agencies. And I
19 think -- I urge the conference to vote for this
20 amendment.

21 CHAIRMAN LEINENWEBER: Commissioner Langrock
22 on the amended motion.

23 COMMISSIONER PETER F. LANGROCK (Vermont):
24 Very briefly, I urge the adoption of it. This is
25 basically a parent's rat rule. It makes parents

1 potentially liable if they don't rat on their kids.
2 That is a scary concept and one which we should be very
3 wary of.

4 CHAIRMAN LEINENWEBER: Commissioner Baggett to
5 close. We are going to close and then vote.

6 COMMISSIONER BRYCE A. BAGGETT (Oklahoma): I
7 share the committee's purpose to criminalize and punish
8 the provision of a place to be used to violate the act.

9 What I don't concur with is when you displace
10 the intention from the person you have accused of a
11 crime and you are going to convict, to a second person
12 whose intention then makes the accused person guilty.

13 The obvious example is the parent who
14 knowingly and intentionally maintains a home and they
15 have a troubled child or a troubling child that's to
16 some degree out of control. The parent, from past
17 experience, is confronted with absolute knowledge that
18 this kid is probably going to be smoking pot and
19 probably keeping enough of it around to qualify for
20 possession with intent. They may search for it and not
21 find it.

22 I share your goal of trying to get the guy who
23 is knowingly providing a crack house. I concur that if
24 that isn't his intention, he can call the cops and
25 protect himself. But that parent just -- let's be

1 realistic. That parent can't call the ccps on their
2 own kid 14 or 15 years of age and declare that they
3 know they are using the pot in that room.

4 I appeal to you that if you can't take care of
5 that situation with this amendment, take care of it
6 some other way. You will have my support for your
7 basic purpose, but give us some leeway, because there
8 are some of us who have had experience with prosecutors
9 less generous than I say you intend to be.

10 CHAIRMAN LEINENWEBER: The question is, shall
11 Section 402 --

12 COMMISSIONER RICHARD L. BRAUN (North
13 Carolina): Commissioner, could I make a quick answer
14 to that, please?

15 CHAIRMAN LEINENWEBER: Then we open up all of
16 the discussion. That was the close of debate.

17 Section 402(c) be amended by striking Line 25.

18 All those in favor, signify by saying "aye."

19 All those opposed.

20 The "noes" have it, the motion -- division.

21 All those in favor, please arise.

22 Is there still a request for a division?

23 Please be seated.

24 Those opposed, please arise.

25 43 voting in favor, 81 opposing.

1 The motion fails. Are there further
2 amendments proposed? Commissioner.

3 COMMISSIONER TOM R. MASON (Mississippi): I
4 would move to amend Session 404(c). I am sorry. 403,
5 is it?

6 CHAIRMAN LEINENWEBER: What page are you on,
7 commissioner?

8 COMMISSIONER MASON: Back to Page 80.

9 CHAIRMAN LEINENWEBER: What section are you
10 in?

11 COMMISSIONER MASON: 402(c), Line 25, Page 80,
12 by adding the words -- after the word "resorted," by
13 adding the words "except by members of the family."

14 That language would go after "resorted to" --
15 "resorted to by persons other than members of the
16 family."

17 CHAIRMAN LEINENWEBER: What's the committee's
18 position on that?

19 It would read, "room, enclosure, or other
20 structure or place, which that person knows is resorted
21 to, except by members of the family, for the purpose of
22 keeping for distribution," et cetera.

23 COMMISSIONER MASON: The cleaner language
24 would be, "resorted to, by persons other than members
25 of the family, for the purpose of." Then it goes on.

1 I think that solves a very narrow problem that
2 we have been debating.

3 CHAIRMAN LEINENWEBER: The committee does not
4 accept that. Is there further discussion on that
5 motion? If not, all those in favor, please signify by
6 saying "aye."

7 Those opposed.

8 The "noes" have it.

9 Further amendments. Commissioner Burdick.

10 COMMISSIONER EUGENE A. BURDICK (North Dakota):
11 In the course of the discussion on this, I heard from
12 the dais the words "knowingly and intentionally," yet
13 in Line 1 you have "knowingly or intentionally."

14 What is the reason for the disjunctive there?

15 COMMISSIONER DAVID A. GIBSON (Vermont): In
16 reviewing the provisions by which criminal statutes are
17 phrased where you want to have the "knowingly or
18 intentionally" provision in there, this is the language
19 that is used. As we understand it, the preferred
20 language is "knowingly or intentionally," not
21 "knowingly and intentionally." It's strictly a
22 drafting mechanism.

23 COMMISSIONER BURDICK: If specific intent -- I
24 think you are wrong about the drafting mechanism. If
25 specific intent is intended, then you cannot have

1 specific intent unless you know.

2 It seems to me the word "knowingly" is totally
3 redundant here. If it's in the disjunctive, some court
4 is going to say that there is an automatic violation
5 here, that the intent -- doesn't limit it to specific
6 intent.

7 COMMISSIONER GIBSON: With all due respect,
8 commissioner, the committee disagrees with your
9 position.

10 COMMISSIONER BURDICK: I will move, then, that
11 the word "or" be changed to "and."

12 CHAIRMAN LEINENWEBER: There is a motion to
13 amend Line 21 by deleting the word "or" and inserting
14 the word "and."

15 COMMISSIONER BURDICK: I'm also on the -- I
16 have a handout that I am working from. Wasn't there a
17 handout on this section? I see some are working from
18 Page 80, and I am working from 402, Amendment No. 2.

19 It would also be true on Line 19 of Page 4 of
20 the handout, Line 1 of the handout on Page 4. That's
21 the draft that I have been looking at all this time.
22 Am I wrong about that?

23 COMMISSIONER GIBSON: You are correct,
24 commissioner.

25 CHAIRMAN LEINENWEBER: Commissioner Davies, on

1 the motion.

2 COMMISSIONER JACK DAVIES (Minnesota): I am a
3 little bothered by the committee just saying they
4 disagree. I would like to know why they disagree. I
5 think Judge Burdick has made a compelling argument --
6 not even an argument. It's an observation.

7 COMMISSIONER GIBSON: Commissioner Davies, as
8 I recall, this particular point has been brought out at
9 the last two annual meetings of this conference. At
10 the one in Washington, the committee said we would take
11 a look at the way that the criminal statutes are
12 drafted to make sure that the wording was correct,
13 because previously we had "knowingly and
14 intentionally."

15 Between Washington and Hawaii we did that, and
16 we determined that the correct way to draft a criminal
17 statute to have the specific intent was to phrase it as
18 you see it throughout this act of Article 4, that the
19 correct drafting in connection with criminal statutes
20 and that which you will find in the federal codes and
21 in the codes, I think, if not of every state, almost
22 every state, is to put it "knowingly or intentionally."

23 That is why we have adopted that scheme of
24 drafting for every criminal provision in this code.

25 COMMISSIONER DAVIES: Mr. Chairman, how can

1 you have something knowingly that's intentional --
2 pardon me -- intentional, that's not also knowingly?
3 It is just gramatically impossible. I think maybe you
4 ought not look at statutes, but rather at a grammar
5 book.

6 COMMISSIONER GIBSON: Perhaps you are correct
7 as a technical matter. But if you want to rewrite the
8 entire criminal law of this country as it has evolved
9 over the last couple hundred years, I think vote for
10 this motion.

11 COMMISSIONER EUGENE A. BURDICK (North Dakota):
12 I totally disagree --

13 CHAIRMAN LEINENWEBER: Excuse me.
14 Representative Johnakin on the motion.

15 COMMISSIONER STEPHEN G. JOHNAKIN (Virginia):
16 I think that Judge Burdick has a point in that the
17 words "or intentionally" may be superfluous, since if
18 you intend something, you certainly know it. Perhaps
19 the word "knowingly" alone would carry the day.

20 But Judge Burdick's motion would not treat the
21 problem of willful blindness. He would require not
22 only knowledge but also intention. This body has made
23 it clear already through its votes that it does want to
24 get the landlord who is passively allowing an activity
25 to occur, even though he didn't intend it, unless the

1 landlord notifies the police of what's going on.

2 Let's vote down the motion.

3 CHAIRMAN LEINENWEBER: Is there further
4 discussion on this amendment? If not, Judge Burdick,
5 you may close.

6 Excuse me.

7 COMMISSIONER MAYNARD E. PIRSIG (Minnesota):
8 Minnesota undertook to examine this very subject when
9 it revised its criminal code. We deliberately
10 eliminated the concept of knowledge, of knowing, of
11 knowingly, because we thought it was one of the most
12 ambiguous terminologies in the criminal law.

13 We left it out, and we changed "intentional."
14 "Intentional" includes everything that is included in
15 "knowledge." We have not had the slightest trouble in
16 the past 25 years with omitting that term.

17 CHAIRMAN LEINENWEBER: Anything further on
18 this? Commissioner Baggett, on the motion.

19 COMMISSIONER BRYCE A. BAGGETT (Oklahoma): The
20 commissioner from Minnesota makes an excellent point,
21 but he left off the second half of it.

22 If "knowingly" is left here in the
23 disjunctive, it is an alternative for intention. What
24 you implied in your statement was that you left
25 "knowingly" out, which would mean that "intentionally"

1 was left as the standard. That I would have no
2 objection to. But if it is left in the disjunctive,
3 then there is no requirement of intention scienter, and
4 knowledge is enough to convict. Knowledge is always
5 including those matters of fact of which you have
6 constructive rather than actual notice. The vice in
7 this use of the disjunctive is that it eliminates the
8 requirement of intent.

9 COMMISSIONER GIBSON: With all due respect, I
10 think we are making a mountain out of a mole hill. The
11 usage in the federal scheme, and I have the statute in
12 front of me, clearly states "knowingly or
13 intentionally."

14 I just want to reiterate. The committee did
15 look at this precise question. It made changes to the
16 draft previously along these lines. If you make a
17 change to the provision to strike "or," to insert
18 "and," you will be changing the body of a great deal of
19 the criminal law which has worked fine over the last
20 couple hundred years in terms of requiring a specific
21 intent to be proved in order to convict.

22 I think the possibility for mischief by this
23 seemingly innocuous change is just very great.

24 COMMISSIONER BAGGETT: A question for Mr.
25 Gibson on that point. Would the committee then accept

1 a change to strike "knowingly or" and just leave it
2 "intentionally"?

3 COMMISSIONER GIBSON: No.

4 COMMISSIONER BAGGETT: Why not?

5 COMMISSIONER GIBSON: For the reasons I have
6 just stated.

7 CHAIRMAN LEINENWEBER: Judge Burdick to close
8 on the motion.

9 COMMISSIONER EUGENE A. BURDICK (North Dakota):
10 North Dakota about ten years adopted a new criminal
11 code which was virtually a copy of the code that was
12 then pending in the Congress.

13 The culpability of almost every section of
14 that code was based on "willfulness" and not on
15 "knowingly" or in many cases even on "intentionally."

16 Whenever a particular culpability was not
17 expressed, there is a general catchall provision that
18 provided that "intentionally" was the culpability
19 standard.

20 Nowhere, do I recall, was the culpability test
21 of "knowingly" inserted. I disagree that that's a
22 standard used throughout the United States. I think
23 that since you have made it very clear that
24 "intentionally" is the culpability standard here, I
25 think you are creating a trap for the unwary when you

1 put the word "knowingly" in the disjunctive. So, I
2 urge the deletion of the words -- either -- I will do
3 it either way. Delete "knowingly or," or change the
4 "or" to an "and."

5 I think my motion was to change "or" to an
6 "and."

7 CHAIRMAN LEINENWEBER: The motion is to amend
8 Section 402(c) on Page 80, Line 21, by striking the
9 word "or" and inserting the word "and."

10 All those in favor, signify by saying "aye."

11 All those opposed.

12 The "noes" have it. The motion fails.

13 Further amendments. Commissioner.

14 COMMISSIONER HARRY M. WALSH (Minnesota): To
15 take another run at the problem of children in the
16 home, paragraph (e) includes two exceptions from the
17 conditions set out in paragraph (c)

18 I move that we add a new subparagraph (3),
19 Page 5, after Line 4, that would read: "(3) By reason
20 of the maintenance of a home for the person's
21 children." Taking that together with the introductory
22 line of paragraph (3), it would read: "A person does
23 not violate subsection (c) by reason of the maintenance
24 of a home for the person's children."

25 There has been a lot of interest in this minor

1 aspect of the paragraph (c) problem, and I think this
2 would be a clear way of taking care of it.

3 CHAIRMAN LEINENWEBER: Your amendment is to
4 add a subparagraph (3) after Line 23, Page 81,
5 subparagraph (e), to state: "By reason of maintenance
6 of the home for purposes of children."

7 Is that correct?

8 COMMISSIONER WALSH: "The person's children."

9 CHAIRMAN LEINENWEBER: For "the person's"?

10 COMMISSIONER WALSH: Yes. Referring back to
11 "person" in the first line of the paragraph.

12 COMMISSIONER REID C. PIXLER (Colorado): I
13 would just like to point out one maybe intended purpose
14 of what you are trying to accomplish there. You may be
15 just including people in the operation of their crack
16 houses by trying to put their children in the house to
17 prevent a charge being brought for the maintenance and
18 the operation of the house.

19 You may do the exact opposite of what we are
20 trying to do, is make sure the children get away from
21 the drugs. I don't think that there is anything in the
22 statute as it is drafted at the present time that's
23 going to really focus on children and their use of
24 drugs in the house.

25 The operative action that brings this about is

1 the distribution of those drugs.

2 COMMISSIONER WALSH: Mr. Chairman. Mr.
3 Pixler, are you suggesting that someone would put their
4 children into a house separate from their own in order
5 to make it protected under this proposal?

6 COMMISSIONER PIXLER: There is some kind of
7 device up here. I just can't hear you when it's
8 running.

9 CHAIRMAN LEINENWEBER: He is saying people
10 would put persons in a crack house in order to prevent
11 themselves from being arrested.

12 Is that your question, sir?

13 COMMISSIONER WALSH: That was my question.

14 COMMISSIONER PIXLER: Yes. That's what I am
15 suggesting to you, that that would be one of the
16 impetuses as far as the use of the statute to protect
17 the individuals themselves.

18 COMMISSIONER WALSH: The use of children as
19 decoys is always a problem. I think the only thing
20 that could be done to prevent it entirely would be not
21 to have any children. This proposal is intended to
22 protect the integrity of the home. It's simple and
23 clear enough.

24 CHAIRMAN LEINENWEBER: Commissioner Ring on
25 the motion.

1 COMMISSIONER CARLYLE C. RING (Virginia): We
2 have in my community two cases that have come up that
3 involve the family. One was in a public housing where
4 the mother knew that the son was involved in a crack
5 operation. She was not doing anything about it. Crack
6 was regularly sold out of the public housing. In that
7 particular episode, because he wasn't paying his bills,
8 they came to knock him off, and they knocked off a very
9 popular policeman.

10 Another instance, a family of some prominence
11 did not know that their children were engaged in a drug
12 distribution operation and no prosecution has occurred
13 of the parents, but a prosecution has occurred against
14 the children.

15 The public housing people that were referenced
16 earlier from the commissioner from Alaska are very
17 upset with the fact that they have to live in a hell
18 hole. And they want these crack houses closed. They
19 don't want them open. They want their children to live
20 in a decent neighborhood.

21 It is not, in most instances, a majority of
22 the public housing people who are involved in the
23 operation of crack houses. It's a minority. But they
24 destroy it for all.

25 In our community, HUD has changed their

1 regulations and now allows evictions from public
2 housing because you are operating a distribution
3 network out of your house. I think that's a wise
4 change in the regulations of HUD.

5 I think if you live in a safe neighborhood,
6 you begin to look at it from the perspective, are you
7 going to have involvement because of the incidental use
8 of your child. But if you live in a neighborhood that
9 is pure hell on wheels, you want some protection.

10 I think the committee has adequately, at least
11 for my purposes, explained that you have to have a
12 parent that knows that it's being used for
13 distribution. I think a parent knows it reaches
14 outside the home and it's now affecting a neighborhood
15 and a community.

16 CHAIRMAN LEINENWEBER: Commissioner Langrock
17 on the motion.

18 COMMISSIONER PETER F. LANGROCK (Vermont):
19 Illinois): Connie, that's just not what it says, what
20 we have got here. I can't understand the resistance.
21 We are not trying to destroy your crack houses -- we
22 are not trying to destroy getting at people in the
23 substantive offenses. What we are saying is, we don't
24 believe that parents should rat on their kids because
25 kids are smoking joints and passing it back and forth.

1 Under the statute, they have to do that or be liable
2 criminally.

3 To say, "prosecutors don't" -- Connie just
4 said there is a wealthy couple that didn't get
5 prosecuted -- the threat, the coercive threat of that,
6 there is no point. Are you telling us we can't
7 draft -- we aren't bright enough to protect -- there
8 are two possibilities. Either you want this conference
9 to go on as a public policy that parents should rat on
10 their kids for passing joints back on and forth in the
11 house, or you are saying we can't draft something that
12 way.

13 It seems to me this is a drafting that way,
14 this does protect that, and that's a policy this
15 conference should adopt. You are not destroying the
16 war on drugs, you are not destroying the ability to get
17 at substantive offenses, or the traditional crack
18 house.

19 CHAIRMAN LEINENWEBER: Commissioner.

20 COMMISSIONER JAMES C. MCKAY, JR. (District of
21 Columbia): I am a father of two 13-year-olds. I think
22 if they were running a crack operation out of my house,
23 I would have two obligations -- one, to notify the
24 authorities. That might be the best thing in the world
25 that happened to them. And secondly, to get them a

1 good attorney like Peter Langrock.

2 I just think that if you put a vague provision
3 like this in, you are going to cause a lot of
4 confusion. I think that a parent would have an
5 obligation, the same as a landlord, if you really had a
6 true distribution going on in the house. I would urge
7 you to defeat the motion.

8 CHAIRMAN LEINENWEBER: Commissioner Braun.

9 COMMISSIONER RICHARD L. BRAUN (North
10 Carolina): I would like to remind you all that this is
11 not some crazy new idea. It has been in the statute
12 that we have had now for 20 years. It's not some new
13 concept at all. In fact, we have limited it a great
14 deal more than the initial statute did, which included
15 only the word "knowingly," and had no defenses that we
16 have put in.

17 Certainly this language is common and has been
18 used, and I think that you're raising a specter of some
19 frightening new concept that is not either one.

20 CHAIRMAN LEINENWEBER: There are presently
21 standing commissioners. You want to speak on this
22 motion? Who wants to speak on this motion?
23 Commissioner Mielke.

24 COMMISSIONER DONALD E. MIELKE (Colorado): The
25 reality of what we see is families dealing drugs, of

1 where that 13- and 14-year-old, sometimes at the urging
2 of the parent, is dealing the drugs. By putting this
3 in this section, making a blanket exception, we would
4 not reach that crack house that is a family activity.

5 CHAIRMAN LEINENWEBER: To close, then we will
6 take a vote.

7 COMMISSIONER HARRY M. WALSH (Minnesota): I
8 would like to change the amendment slightly to narrow
9 it, to narrow the amendment by adding the word "solely"
10 before the phrase "by reason of" -- "solely by reason
11 of the maintenance of a home for the person's
12 children."

13 COMMISSIONER RICHARD L. BRAUN (North
14 Carolina): Could you define children? 35-year-old
15 children?

16 CHAIRMAN LEINENWEBER: That wasn't your
17 amendment. Your amendment was, as I understood it, by
18 reason of --

19 COMMISSIONER WALSH: My amendment was to add
20 "(3) By reason of the maintenance." My change is to
21 make it read: "(3) Solely by reason of the
22 maintenance," et cetera.

23 COMMISSIONER LANGROCK: Could I make a
24 suggestion, that you make that "minor children."

25 COMMISSIONER WALSH: I accept that.

1 CHAIRMAN LEINENWEBER: Minor children. We are
2 voting on a new subparagraph (3) which will read:
3 "Solely by reason of maintenance of the home for the
4 minor children of the person."

5 All those in favor, signify by saying "aye."

6 All those opposed.

7 The "noes" have it. The motion fails.

8 Further amendments.

9 There has been a request for a division. All
10 those in favor of the motion, please rise.

11 Is there still a request for a division?

12 The other side, stand. Those opposing, stand.

13 Is there still a request for a division?

14 The request for division -- the motion loses.

15 Commissioner Perlman for what, let's hope,
16 perhaps will be the last amendment.

17 COMMISSIONER HARVEY S. PERLMAN (Nebraska): I
18 hope so, too. I'm still on this problem, but I take it
19 the resistance to trying to do something with the
20 hypotheticals that Peter raises is that there are some
21 families involved in this activity and that you don't
22 want to immunize parents who are involved in the
23 activity.

24 The other kind of thing that I sense is that
25 parents have some responsibility, and you don't want

1 parents, even if they know their kids are doing this,
2 to stand idly by.

3 I would propose an amendment to add a
4 subsection (3) which reads: "Or if the person actively
5 and in good faith is seeking drug treatment in a
6 medically recognized treatment program for the person
7 committing the offense."

8 I believe that would force the parent to do
9 one of two things, either report to the law enforcement
10 officer, agency, or attempt to get their child
11 treatment. I think that's the kind of incentive one
12 ought to give parents, not the bald dilemma of either
13 reporting or going to jail themselves.

14 CHAIRMAN LEINENWEBER: Would you please repeat
15 the language you proposed for new subparagraph (3), as
16 I understand it, to sub (e).

17 COMMISSIONER PERLMAN: Yes. "Or if the person
18 actively and in good faith is seeking drug treatment in
19 a medically recognized treatment program for the person
20 committing the offense."

21 CHAIRMAN LEINENWEBER: That's accepted.

22 On the motion, Commissioner Meilke.

23 COMMISSIONER DONALD E. MIELKE (Colorado): Mr.
24 Chairman, I would urge the committee to listen to the
25 argument before it accepts. We have heard stores about

1 what happens with the poor defense -- person charged
2 with drugs. This one scares me because probably the
3 worst rampage we have had in Colorado was a person in
4 treatment, and, in treatment, left that treatment, went
5 on a rampage and got cocaine -- name was Eugene
6 Thompson. You read about him, possibly, in Time
7 magazine or some of the other magazines. That
8 Thompson, last year, while in this treatment -- which
9 this would have given him an exception -- went out and
10 raped and killed three people before he committed
11 suicide.

12 I don't think this is the right place for that
13 exception if that crack house had been part of that,
14 because he had been in treatment at the facility.

15 CHAIRMAN LEINENWEBER: Commissioner.

16 COMMISSIONER CHARLES W. JOINER (Michigan): It
17 seems to me this amendment doesn't make sense, because
18 the word "perscn" here is the person who is criminally
19 responsible, which is the owner of the house. I don't
20 think that was what the commissioner from Nebraska
21 intended should be the person who should be the person
22 in treatment. I thought the person he wanted to be in
23 treatment was the child in some way. The way he has
24 got it worded, it doesn't come out that way.

25 COMMISSIONER HARVEY S. PERLMAN (Nebraska): I

1 don't think so. The motion was, and my suggestion was,
2 that it was the person who owns the house is trying to
3 get the person doing the illegal act into a drug
4 treatment program.

5 If you want to translate that to parent and
6 child -- if I am the parent maintaining a house that I
7 know my kid is passing drugs back and forth, I have an
8 obligation to do one of two things. Otherwise I'm
9 criminally liable. I have an obligation to report to a
10 law enforcement agency or an obligation to try and get
11 my kid into treatment.

12 If I do one of those two things, I don't think
13 I ought to be criminally responsible.

14 CHAIRMAN LEINENWEBER: Anything further?

15 COMMISSIONER PETER F. LANGROCK (Vermont):
16 Just in response to the commissioner from Oklahoma. It
17 is a non sequitur. The guy, he himself, is sometime
18 liable in every sense of the word. All we are saying
19 is a parent who puts a kid into treatment doesn't have
20 to rat on the kid. That's not an awful bad thing as
21 far as I'm concerned.

22 COMMISSIONER STEPHEN G. JOHNAKIN (Virginia):
23 Mr. Chairman, I would de-criminalize the conduct of
24 that parent if that parent were seeking treatment, not
25 only for that parent's own child, but also for the

1 other children to whom little Johnny is distributing
2 the drug. This is a distribution offense. This goes
3 back to subsection (c), which deals with distribution.
4 Little Johnny is a distributor. He is ruining the
5 other kids in the neighborhood. If the parent is
6 merely seeking treatment for that parent's own child
7 and is doing nothing to prevent little Johnny from
8 distributing from within the house to other kids in the
9 neighborhood, that is not enough. That conduct should
10 not be de-criminalized. Either turn in little Johnny
11 or stop his distribution behavior.

12 COMMISSIONER BRUCE E. MUNSON (Wisconsin): He
13 took the words out of my mouth. I would like to take
14 exception to the use of the word "rat." I don't think
15 you're doing your kid any favor if you don't rat on
16 your child if they are engaged in distribution of
17 drugs. I think that's the worst thing you can do is to
18 turn your back on it and hope that maybe he will grow
19 out of it.

20 Let's not forget the other kids, though, that
21 were just mentioned by the previous commissioner. Are
22 they getting treatment?

23 CHAIRMAN LEINENWEBER: Commissioner.

24 COMMISSIONER STEVEN P. RADER (North Carolina):
25 I would just simply point out that the language of the

1 amendment offered does not limit this to the
2 parent-child situation. It uses the language "person."

3 I would just wonder in that situation, if you
4 had somebody maintaining a crack house, if the landlord
5 would be protected by the tenants saying: Hey, I'm in
6 drug treatment.

7 Are we creating a situation where these people
8 are just going to go out and go through the motions of
9 going through a drug treatment program and thereby
10 insulate these landlords?

11 CHAIRMAN LEINENWEBER: Commissioner Perlman to
12 close. Would you please restate the specific language.

13 COMMISSIONER HARVEY S. PERLMAN (Nebraska):
14 The specific language is, "or if the person actively
15 and in good faith is seeking drug treatment in a
16 medically recognized treatment program for the person
17 committing the offense."

18 It applies to distribution. Little Johnny is
19 distributing to Sally. Then it's Johnny that's the one
20 that's at issue, not Sally. If you have somebody
21 else's kid in your house distributing, then that's the
22 person involved. I didn't limit it to parent and
23 child, because that has definitional problems, and
24 because I couldn't get it drafted in time.

25 At least the sense is that this is not -- I

1 agree, parents have a responsibility. I thought that
2 was why many of us resisted the temptation to immunize
3 families completely. I think parents have a
4 responsibility not only to report to a law enforcement
5 agency, but I think they can exercise their full
6 responsibility by trying to get their kids into a
7 treatment program.

8 COMMISSIONER LANGROCK: Point of order. I
9 understood the committee had accepted this.

10 CHAIRMAN LEINENWEBER: The body has not
11 accepted it, so we are going to vote.

12 All those in favor, signify by saying "aye."

13 All those opposed.

14 The "noes" have it. The amendment fails.

15 Further amendments? Seeing no one seeking attention,
16 the Chair recognizes Commissioner Gibson for a motion.

17 COMMISSIONER DAVID A. GIBSON (Vermont): Mr.
18 Chairman, I move that the Committee of the Whole rise,
19 report that it has had under consideration the Uniform
20 Controlled Substances Act, has considered it section by
21 section, has made certain changes and amendments, and
22 recommends that the act, as so amended, be presented to
23 the conference for a vote for the states for final
24 approval.

25 CHAIRMAN LEINENWEBER: You have heard the

1 motion.

2 All those in favor, signify by saying "aye."

3 All those opposed.

4 The "ayes" have it. The motion carries.

5 Mr. President, the Committee of the Whole
6 reports that it has had under consideration the Uniform
7 Controlled Substances Act, has considered it section by
8 section, has made certain changes and amendments, and
9 recommends that the act as so amended be presented to
10 the conference for vote by the states for final
11 approval.

12 ---o0o---

